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## JURISDICTION

The decision of the Court of Appeals was entered on February 16, 1954 (P. 6-19), and its decree on March 17, 1954 (P. 20). Petitioner's petition for rehearing and the Board's motion for clarification of the opinion were denied on March 9 (P. 35, 37). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

## QUESTIONS PRESENTED

1. Does Section 8(d) of the National Labor Relations Act prohibit any strike during the life of a collective bargaining agreement, even though the agreement provides for reopening with the right to strike, and even though the 60-days' notice required by Section 8(d) is given?

2. When an employer is charged with an unfair labor practice, under Section 8(a)(1) and (3) of the Act, for refusal to reinstate unreplaced strikers after a strike—

(a) is it a valid defense that the employer believed that the strikers had engaged in misconduct;

(b) must the Board show that the denial of reinstatement was "for the purpose of discouraging membership in the union"?

3. Does a trial examiner's uniform acceptance of the testimony for the strikers and uniform rejection of the testimony for the employer prove his "bias and hostility" and vitiate his findings?

## STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are set forth in the Appendix, *infra*, p. 26

## STATEMENT

Petitioner is Local No. 3 of the United Packinghouse Workers of America, CIO. Petitioner's members are employed at the Cedar Rapids, Iowa, plant of Wilson & Co.,

Inc. (hereafter referred to as the Company). Other locals of the United Packinghouse Workers of America, CIO (hereafter referred to as the International), i.e., Locals Nos. 6 and 37, are made up of members employed at the Company's Albert Lea and Faribault, Minnesota, plants.

*The contract*—On December 20, 1946, the Company and the International, the latter acting on behalf of its local unions, entered into a collective bargaining agreement covering seven of the Company's plants, including those at Cedar Rapids, Albert Lea and Faribault (R. 86; App. 1027-1049). This contract was to run until August 11, 1948, and from year to year thereafter (R. 86; App. 1049). It contained a provision permitting reopening by either party, once before August 11, 1947, and once between that date and August 11, 1948, on 30-days' written notice and "solely on the issue of general wages" (R. 86; App. 1047). The contract did not contain a no-strike clause, and by exchange of letters on December 26, 1946, the parties confirmed their understanding that on a reopening on wages "the Union has the right to strike and the Company has the right to lock out" (App. 991).

*The strike*—On December 19, 1947, the International notified the Company in writing that it reopened the contract, in accordance with its terms, on the question of general wage increases (App. 1055-1056). The notice also stated that it was given pursuant to Section 8(d) of the National Labor Relations Act.

Wage negotiations reached an impasse and a strike commenced on March 16, 1948 (App. 629). On June 6, 1948, the locals concerned voted to end the strike, and the strikers reported for work on June 7, 1948 (R. 87, 96; App. 331, 647, 891-892, 992). The Company refused to reinstate some of the strikers, even though they had not been replaced during the strike.

*The Board proceedings*—Charges having been filed with the National Labor Relations Board by Petitioner (R.

The Court's discussion of Section 8(d) comes only after a lengthy discussion of other possible grounds for decision, and it is not possible to state that the 8(d) holding is, without doubt, the sole holding of the Court. That such is the case, however, is indicated by the fact that, after discussing the other issues, the Court begins its discussion of the 8(d) issue by saying: "However, it is urged by the company that the Board was without jurisdiction in the matter . . ." (P. 16). Further, after it reaches its conclusion as to Section 8(d), the Court says:

> "As this disposes of the issues raised by the petition for review filed by the union, as well as the questions raised by the petition for review filed by the company, we pretermit a consideration of other contentions urged by the respective petitioners." (p. 19).

Earlier in the opinion, in discussing the contentions later to be pretermitted, the Court appears to declare that the findings of the Board and the Trial examiner, that the 31 employees were discharged or denied reinstatement for participating in the strike or other protected union activity, are not supported by substantial evidence (P. 15). The court reaches this conclusion by way of the following propositions:

(1) Proof that the Company refused to reinstate strikers, even though they had not been replaced, was not sufficient to make out a *prima facie* case of illegal discrimination (P. 11-12).

(2) It is a sufficient defense that "the company had reasonable grounds to believe" that the strikers had engaged in misconduct and "in reliance upon such belief refused to reinstate them." (P. 15).

(3) "The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer * * * convinces us of his bias and hostility." (P. 12). It "goes far to weaken or destroy the pre-

sumption of correctness usually attributed to the findings of the trier of facts"[4] (P. 13).

Petitioner's petition for rehearing, filed on March 2, 1954 (P. 21-34), and the Board's motion for clarification of the opinion, filed on March 8 (P. 35-37), were denied on March 9 (P. 35, 37).

## REASONS FOR GRANTING THE WRIT

### Introduction

As stated, we believe that the decision of the Court below is based solely on Section 8(d) of the Act. It is possible, we concede, to read the opinions also resting on other grounds. We believe that on either hypothesis issues are presented which warrant review by this Court. In the discussion below we will present our reasons for believing why, on any reading of the opinion, certiorari should be granted.

### I

Section 8(d) of the National Labor Relations Act defines the duty to bargain collectively under that Act. It provides, among other things, that where a collective bargaining contract is in effect, no party thereto shall terminate or modify it unless such party

> "(1) serves a written notice upon the other party to the contract of the proposed termination or modifica-

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[4] The Court demonstrated its own freedom from bias and hostility by assuming, without detailed examination, that the Company's testimony was true and that of the strikers false, and by asserting, in disregard of the record and contrary to the facts, that "it was necessary for the governors of the states where the plants are located to call out the militia of the respective states to quell mob violence * * *." (P. 14). The only thing in the Record bearing on this assertion is an offer by the Company to prove that the Governor of Minnesota ordered the National Guard to Albert Lea, Minnesota, during the strike (App. 875). The offer was rejected, presumably because it was not proposed to relate the proof to any of the discharged strikers (Id.). The Record contains no reference to any calling out of militia at Cedar Rapids or at Faribault, and no troops were in fact called out at those places.

tion sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;"

* * * *

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later: * * * *"

Section 8(d) further provides that

"Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

The Court below held that the words "whichever occurs later" in Section 8(d)(4) bar a strike for the duration of a collective bargaining contract, even though the contract provides for reopening with the right to strike, and even though the 60 days' notice required by Section 8(d) is given. And it further held that under the last quoted portion of Section 8(d) the strikers lost their status as employees and were subject to discharge.

This holding that Section 8(d) prohibits any strike during the life of a contract, even one which provides for reopening with the right to strike, presents an issue which warrants review by this Court. This issue affects the right to strike under more than half of the collective bargaining contracts, covering millions of workers, now in effect in this country. It affects the willingness of unions to negotiate long term contracts, and contracts are being negotiated every day. Its prompt resolution by this Court would, therefore, be in the public interest. Further, the

interpretation given the statute by the Court below is probably erroneous. It overturns the Board's settled construction of the statute, which has been acquiesced in by Congress and relied upon in the negotiation of thousands of collective bargaining agreements; and it rejects a reasonable construction of the statute in favor of one which is both unreasonable and detrimental to stable labor relations.

1. *The issue is of major importance*—The decision below in effect writes into every collective bargaining agreement a no-strike clause for the duration of the agreement. The available data indicates that more than half of the collective bargaining agreements now in effect in this country do not unconditionally bar all strikes for their duration: all of these agreements are affected by the issue posed in this case.

An analysis by the Bureau of Labor Statistics, Department of Labor, of 2,578 contracts in effect during 1951 and 1952, covering more than 5,750,000 workers, reveals that only 32 percent of the agreements contained "an absolute ban on strikes and lock-outs during the term of the contract", while 56 percent conditionally restricted the right to strike. Monthly Labor Review, Vol. 74, pp. 272-275 (March, 1952). This 56 percent included contracts, like that involved here, permitting a strike "in event of deadlock over wage reopening or other specified issues", contracts permitting a strike after exhaustion of the grievance procedure, etc. The remainder of the contracts —12 percent—contained no restriction on the right to strike.

A January, 1954 survey of 400 contracts by the Bureau of National Affairs shows that 39 percent of the contracts contain an absolute ban upon strikes for the duration of the contract; that 50 percent conditionally restrict the right to strike, with most of these contracts permitting a strike on a wage reopening; and that about 11 percent con-

tain no restriction on the right to strike.[5] This study adds:

> "These figures show a moderate gain in conditional pledges at the expense of absolute bans. However, analysis of the clauses indicates that this follows from the fact that contracts generally tend to be drafted for longer terms—longer terms mean more wage reopenings and wage reopenings are almost always accompanied by provision for suspending strike bans in the event of a deadlock in negotiations. In other words, the increase in conditional strike pledges does not represent a trend toward instability in contracts. Instead it follows from the trend toward longer, more stable contracts with only limited opportunity for renegotiation during their terms." (p. 15:325)

It therefore appears that some 50 to 55 percent of the collective bargaining contracts permit strikes in some circumstances, such as a deadlock in negotiations on a wage reopening, and that another 10 or 12 percent do not restrict the right to strike during the life of the contract. The decision below interprets the Act as writing an unconditional no-strike clause into all of these contracts. Thus, what is at stake here is the right to strike under considerably more than half of the collective bargaining agreements now outstanding in the country. According to our best estimate, these contracts cover more than eight million workers.[6]

Further, new contracts are being negotiated daily, and unions cannot safely ignore the decision below. While it

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[5] The statistics in this paragraph are taken from pp. 15:325-15:326 of the loose-leaf service on "Collective Bargaining Negotiations and Contracts" published by the Bureau of National Affairs (Washington, D. C.).

[6] The Bureau of Labor Statistics, Department of Labor, states that no estimates are available as to the number of workers in the United States covered by collective bargaining agreements.

Total union membership in the United States was estimated, for 1952, at around 16 million. (Directory of Labor Unions in the United States, 1953, Bulletin No. 1127, Bureau of Labor Statistics, Department of Labor.)

stands, unions will be under strong impulsion to negotiate short term contracts, instead of longer term contracts with a wage reopening and the right to strike. Such a development would, as shown below, make for less stable labor relations.

The importance of this issue to the workers, unions, and employers involved, and to the general public, warrants, we submit, its review by this Court. A conflict of decisions among the courts of appeals might be several years in developing. To leave the issue unsettled over such a period of time would create chaos and uncertainty, and promote industrial strife.

2. *The decision below is probably incorrect*—The Court's interpretation of Section 8(d) as barring a strike for the duration of a contract, even one specifically reserving the right to strike, rests on the words "whichever occurs later" in Section 8(d)(4). Admittedly this phrase is susceptible of the interpretation given it by the Court below: that is the literal interpretation. The phrase can, however, also be understood as applying only to situations in which the notice to modify a contract is given *less* than 60 days before the expiration date of the contract. Further, Section 8(d)(4) as construed by the Court below is inconsistent with the final portion of 8(d), which penalizes employees only for "a strike within the sixty-day period" and does not refer to the expiration date of the contract at all. It is this final portion of Section 8(d) on which the decision below actually turned: the Court below held that under it the strikers lost their status as employees and so were subject to discharge. Thus, the decision below does not rest on a literal reading of the statute, but on importing into the final portion of 8(d) the

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The number of workers covered by collective bargaining agreements in this country is probably around that figure, or perhaps a bit higher.

It thus seems a safe estimate that something in excess of 8 million workers are covered by contracts, the right to strike under which is affected by the issue in this case.

restrictions on the right to strike found, if at all, only in Section 8(d)(4).

Other reasons for believing that the decision below is probably erroneous, in addition to those already indicated, are as follows:

(1) The interpretation given the statute by the Court below runs counter to the legislative history. During the debate on overriding the President's veto, Senator Taft said (93 Cong. Rec. 7530):

> "I think ours is a very mild provision, which merely says to unions, 'You must have a 60-day reopening clause in your contract'."

See also his statement during the Senate debate, quoted in footnote 7, below.

(2) The decision overturns the Board's settled construction of the statute. In *United Packinghouse Workers of America, CIO, and Wilson & Co.*, 89 NLRB 310 (1950), an earlier case involving the Company and the International, the Board, after a full exploration of the legislative history, to avoid a conflict between Section 8(d)(4) and the final proviso to Section 8(d), and in the light of the relevant policy considerations, held that the phrase "whichever occurs later" was intended only to apply to situations in which notice to modify a contract is given *less* than 60 days before the termination of the contract.[7] The Board said (p. 313-314):

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[7] In support of this conclusion the Board quoted (89 NLRB at 316) the following statement by Senator Taft during the debate on the Senate floor (93 Cong. Rec. 3839):

"We have provided in the revision of the collective bargaining procedure, in connection with the mediation process, that before the end of the contract, whether it contains such a provision or not, either party who wishes to open the contract may give 60 days' notice in order to afford time for free collective bargaining, and time for the intervention of the Mediation Service. *If such notice is given, the bill provides for no waiting except during the life of the contract itself. If, however, either party neglects to give such notice and waits, let us say, until 30 days before the end of the contract to give the notice, then there is a waiting period provided during*

"If Section 8(d)(4) is read so as to prohibit a strike for modification of a contract until that contract expires the concept of contract modification is rendered almost meaningless, and the Act will have destroyed the effectiveness of provisions contained in hundreds of collective bargaining agreements whereby the parties have agreed to consider wage and similar adjustments during the term of the agreement, and, in the absence of a no-strike clause, have further recognized that demands made pursuant to reopening clauses may be supported by the traditional modes of economic pressure. *Such a result would constitute a serious deterrent to the execution of collective bargaining agreements of any substantial duration, and would thereby remove a most important encouragement to stability in industrial relations.*" [Italics supplied.]

(3) Congress agrees with and has acquiesced in the construction given Section 8(d) by the Board in the *United Packinghouse Workers* case.

Congress was familiar with this issue as early as 1948. The final (December, 1948) report of the Joint Committee on Labor-Management Relations, created by Section 401 of the Taft-Hartley Act, discusses it at length. (Rept. 986, 80th Cong., 2nd Sess., pp. 6, 62-63.) The Joint Committee had a Republican majority, with Senator Ball as chairman. After posing the problem of statutory interpretation the Committee report states (p. 62):

"Reading section 8(d) as a whole seems to lead to the conclusion that the act permits a strike, after a 60-day notice, in the middle of a contract which authorizes a reopening on wages. Use of the words 'or modify' and 'or modification' in the proviso, and use of 'or modification' in section 8(d)(1), and the statement in the final paragraph of the section that the

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*which the strike is an unlawful labor practice for 60 days from that time, or to the end of the contract and 30 days beyond that time.*" [Italics supplied]

> parties are not required to agree to any modification effective before the contract may be reopened under its terms, all seem to contemplate the right of either party to insist on changes in the contract if they have so provided. The right of the union would be an empty one without the right to strike after a 60-day notice."

The report then notes that the issue is before the Board in the *United Packinghouse Workers* case, but that a decision in this case will take some time. The report continues (p. 63):

> "Since the words of the statute are susceptible to opposing interpretation, and it is a matter of extreme importance to both management and labor (it should be noted that the section applies likewise to employers in prohibiting a lock-out), the committee recommends to Congress that the intent be clarified."

After proposing specific language, this portion of the report concludes (p. 63):

> "The committee has noted an increasing demand by labor organizations for short-term contracts, and for contract provisions permitting the right to cancel the entire contract on a 60-day notice, with the stated reason being the questionable nature of the right to strike during a contract term. In order that the parties may better know their rights in the matter, the committee recommends the adoption of the amendments which would permit a strike or lock-out after a 60-day notice in support of demands they have anticipated in a reopening clause."

See also the report later filed by minority members of the Joint Committee: Report No. 374, 81st Cong., 1st Sess., pp. 45-46.

During the next year, 1949, the question of Taft-Hartley revision was extensively considered in the Congress. During that Congress (81st Cong., 1st Sess.) both the Senate

Labor and Public Welfare Committee and the House Education and Labor Committee had Democratic majorities, and the bills reported out by the Committee majorities (S. 249 in the Senate, and H.R. 2032 in the House) proposed to repeal Section 8(d) in its entirety, thus disposing incidentally of the issue here involved.

The Republican minority in the Senate Committee, headed by Senator Taft, repeated the proposal made by the Joint Committee the year before: that Section 8(d) be amended to make it clear, in line with the original intent of Congress, that it does not prohibit a strike during the life of a contract pursuant to a contract reopening. See Rept. 99, Pt. 2, 81st Cong., 1st Sess., P. 27. This proposal was at different times accepted by both the Senate and the House, though ultimately no new act was passed. The Taft bill, which passed the Senate that year—S. 249, 81st Cong., 1st Sess.—contained such a provision. See Section 8(d)(4), p. 20. So did the Wood bill, which passed the House but was later recommitted. H.R. 2238, 81st Cong., 1st Sess., Section 8(d)(4), p. 20.

The Board handed down its decision in *United Packinghouse Workers* on April 12, 1950, and the interpretation there given the statute is fully discussed in its 15th Annual Report for the Fiscal Year 1950, at pages 136-137. Since the Board decision, the Congress has indicated no further interest in the issue: neither Democrats nor Republicans have proposed any revision, as respects this issue, of Section 8(d). The only inference which can rationally be drawn is that the Congress, with a unanimity virtually unknown in this controversial field, has been entirely satisfied with the Board's construction of the statute.

In 1951, the Congress amended the National Labor Relations Act in some respects (P. L. 189, 82nd Cong., 1st Sess.), but it did not amend, or consider amending, Section 8(d).

During the current (1954) session of Congress the Re-

publican majority of the Senate Labor and Public Welfare Committee expressed dissatisfaction with certain interpretations which the Board has given to Section 8(d), and reported out a bill, S. 2650 (later recommitted by the Senate), which would, *inter alia*, have amended Section 8(d) to overrule these interpretations. The Committee's complaint, however, was solely about the so-called *Allied Mills* (82 NLRB 854) doctrine—the doctrine that, even in the absence of a reopening clause, the duty to bargain collectively includes the obligation to discuss, during the life of a contract, matters not covered by the contract. See Senate Rept. 1211, 83rd Cong., 2nd Sess., p. 13. The Committee did not discuss the Board's doctrine that Section 8(d) does not invalidate strikes pursuant to reopening clauses, and its amendment did not touch that point.

(4) The Board's interpretation of Section 8(d) has been relied upon by unions in the negotiation of thousands of collective bargaining agreements. Long term contracts with wage reopenings and the right to strike are an alternative to short term contracts. During the period before the Board's decision in *United Packinghouse Workers*, unions were, so the Joint Committee stated, turning to short term contracts. (See *supra* p. 14) That was one reason why that Committee proposed to clarify the Act to make clear the validity of strikes under wage reopenings.

Since the Board's decision, unions have, as the Bureau of National Affairs survey recites (*supra*, p. 10) turned more and more to long term contracts with reopening clauses and the right to strike. Obviously, unions would not have negotiated these contracts but for the Board's interpretation upholding the right to strike. As the Joint Committee said (*supra*, p. 14), "The right of the union [i.e., to reopen] would be an empty one without the right to strike after a 60-day notice." To deprive unions now of the *quid pro quo*—the right to strike on a contract reopening—

which induced them to bind their members by long term contracts, would be most unjust.

(5) Finally, as pointed out by the Joint Committee, the Board, and the Bureau of National Affairs (see *supra*, pp. 10, 13, and 14) long term contracts with limited wage reopenings and the right to strike minimize the likelihood of strikes, as compared with short term contracts. The decision below, by invalidating such contracts and forcing unions to turn to short term contracts, will, if it stands, tend to increase the number of strikes and impair industrial peace. It is not only inconceivable that Congress could have intended such a result; it is clear as a matter of history that it did not.

## II

The holding, if it be a holding, of the Court below, that, on the evidence, the strikers, were not entitled to reinstatement, rests on two interrelating propositions.[8] They are (1) that it is a sufficient defense for the Company that it had "reasonable grounds to believe" that the strikers had engaged in misconduct, and "in reliance upon such belief refused to reinstate them" (P. 15)[9], and (2) that proof that the Company refused to reinstate strikers, even though they had not been replaced, was not sufficient to make out a case of illegal discrimination. It was necessary in addition that the Board "affirmatively" show that

[8] This holding probably rests also on various other interrelated propositions or assumptions, such as the Court's assertion, discussed *infra*, pp. 24-25, that the trial examiner's uniform rejection of the Company's testimony showed bias and hostility, thereby discrediting his findings, and entitling the Court to weigh the evidence independently. The fact that the Court's ultimate holding that, on the evidence, the strikers were not entitled to reinstatement, is arrived at through the intermingling and entangling of a number of different postulates should not dissuade this Court from reviewing the case. For that would mean that the lower courts can avoid Supreme Court review if only their decisions are sufficiently obscure.

[9] The Court at this point quoted from its earlier decision in *NLRB* v. *Stafford*, 206 F. 2d 19, 22 as follows:

> "The fact in issue is the intent, motive or reason in respondents' mind for the discharge of the complainants."

the denial of reinstatement to returning strikers was "for the purpose of discouraging membership in the Union" (P. 12, 15).

On both of these points, the decision below is in conflict with decisions of other courts of appeals. In addition it conflicts in principle with the recent decision of this Court in *Radio Officers' Union* v. *NLRB*, 347 U. S. 17. Further, the practical effect of the decision below is to deny to strikers any protection against unlawful discharge, by, on the one hand, providing employers with a subjective, easily asserted defense; and, on the other, imposing on the Board a burden of proof virtually impossible for it to meet.

1. The assertion of the Court below that the strikers "were not entitled to reinstatement" because "the company had reasonable grounds to believe" that they had engaged in misconduct (P. 15) is in direct conflict with the decision of the Court of Appeals for the Fourth Circuit in *NLRB* v. *Industrial Cotton Mills*, 208 F. 2d 87, certiorari denied April 5, 1954, No. 582, October term, 1953. In that case, the question, as stated by the Court of Appeals, was (p. 90):

> "* * * whether the Board has the power to order the reinstatement of Stallings when his employer has refused reinstatement to him after the strike on account of the employer's honest but mistaken belief that Stallings had been guilty of *strike misconduct*."

The Court held that the Board had the power to order reinstatement of the striker, notwithstanding the employer's good faith belief, when it refused him reinstatement, that the striker had been guilty of misconduct. The Court said (p. 91):

> "The law is quite clear that * * * the refusal of an employer to reinstate a striker, whose place has not been filled, constitutes a violation of Section 8(a)(1) and (3), and equally clear is the right of the employer

> to refuse reinstatement when the striker has actually been guilty of serious strike misconduct.
> * * * * *
>
> "As we view the situation, the statutory protection extended to a blameless employee is a firm and clear guarantee, not one which constantly varies with the correctness of the employer's opinion or with accuracy of his sources of information. Nor does the Act expose the innocent employee to the hazard of his employer's mistake where the consequence of this mistake is to divest the employee of a right guaranteed by the Act."

The decision below also conflicts with the similar decision of the Court of Appeals for the Third Circuit in *Cusano* v. *NLRB*, 190 F. 2d 898, where the Court said (p. 902):

> "It is true that an employer may discharge an employee for a good reason, a bad reason, or no reason at all. * * * This rule, however, is necessarily limited where an employee is engaging in activities protected by the Act. The right of a union official or representative to inform his fellow employees of the proceedings at the Board's regional office is certainly one of the activities so protected. To adopt petitioner's view would materially weaken the guarantees of the Act, for the extent of employees' protected rights would be made to vary with the state of the employer's mind."

2. The statement of the Court below, that the Board must "affirmatively" show that the denial of reinstatement to returning strikers was "for the purpose of discouraging membership in the union" (P. 12, 15), is in direct conflict with the decisions of the Courts of Appeals for the Third and Fourth Circuits in the cases just discussed, and conflicts in principle with the recent decision of this Court in *Radio Officers' Union* v. *NLRB*, 347 U. S. 17.

This point is closely related to that just discussed. In the view of the Court below, a refusal to reinstate unre-

(2) With but one or two exceptions, none of the strikers who were denied reinstatement were told by the Company the reason for the denial. Some were even led to believe that they might still be recalled in the future (App. 46, 96-97, 121-123, 139-140, 186, 198, 212, 220-221, 234, 244-245, 485, 561, 631-632, 674, 684, 694, 700, 709-710, 718-719, 749-750, 894, 906, 914, 925).

(3) Two employees (Spiker and Roman) were invited by the Company, ten days after the incident alleged to have been the reason for discharge, to return to work *during the strike* (App. 228, 231-232, 609, 991; Bd. App. 6), but were denied reinstatement after the termination of the strike (App. 139, 227).

(4) The Company at no time made any effort to determine from the accused employees their version of the facts with respect to the incidents of alleged misconduct. (See record citations under "(2)" above; also App. 219, 225, 232, 241, 563). In this connection, many of the discharged employees were persons with service with the Company for periods as long as 25 years (Ulman, App. 693), 23 years (Trachta, App. 233), 19 years (Piper, App. 893), 18 years (the Scurlocks, App. 181, 242), 15 years (Feuerhelm and Flanagan, App. 628, 716), 12 years (Spiker and Unash, App. 226, 197), 11 years (Dye, App. 44), etc.

(5) The defense of alleged strike misconduct was not put forward in the answer originally filed by the Company

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267), one was a representative of the International Union (App. 251), and four others were union stewards (App. 139, 169, 182, 222). The sixteenth employee ordered reinstated at Cedar Rapids was a union steward discharged for actions connected with a controversy over presentation of a grievance (App. 303-304, 306-311).

The ten employees denied reinstatement at the Albert Lea plant at the close of the strike include (1) the Vice President (App. 716-717), (2) a man who had served the year before as Secretary and departmental chief steward (App. 694), (3) the Public Relations Officer (App. 645) of the local union, (4) the chairman of the local strike committee (App. 674), (5) the Chief Plant Steward (App. 700), (6) a departmental chief steward who was also a member of the national and local bargaining committees (App. 682-683), and (7) a union steward (App. 660).

to the Board's complaint (General Counsel's Exhibit 5A; App. 27). The Company relied, rather, on its claim that the strike was illegal under Section 8(d). The Company's answer was not amended to assert strike misconduct until the second day of the hearing, and then with no specification as to the nature and time of the alleged acts of the individual employees (Respondent's Exhibit 3; App. 72-74).

It is too much to hope that in this kind of a case company officials will take the stand and testify that they discharged employees for participation in a lawful strike. Short of that, it is not perceived how a case of discriminatory discharge could ever be proved to the satisfaction of the Court below.

## III

The statement of the Court below that the trial examiner's uniform acceptance of the testimony for the strikers and rejection of the testimony for the Company establishes invalidating bias on his part is contrary to the decision of this Court in *NLRB* v. *Pittsburgh S. S. Co.*, 337 U. S. 656.

The Court below said it was convinced of the trial examiner's "bias and hostility" because of:

> "The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer regardless of the fact that the evidence of the employer was corroborated in most instances by the surrounding facts and circumstances * * *." (P. 12).[12]

[12] The Court's only specific complaint (P. 13-14) about the trial examiner's findings or rulings was that he had rejected affidavits which the Company offered to show misconduct on the part of the strikers. The trial examiner evidently rejected these affidavits because he was not convinced that the Company had made a real effort to secure the personal attendance of the affiants (App. 591-598). This ruling appears to have been well within the examiner's discretion.

This "prejudice, bias and hostility," the Court said, "goes far to weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts" (P. 13). The Court apparently felt free, therefore, to weigh the evidence for itself and to disregard the examiner's findings, which had, except as to one discharged employee, been sustained by the Board.

The viewpoint of the Court below in this respect precisely parallels that of the lower court in the *Pittsburgh S. S. Co.* case, which this Court reversed. This Court said (337 U. S. at 659):

> "*First:* We are constrained to reject the court's conclusion that an objective finder of fact could not resolve all factual conflicts arising in a legal proceeding in favor of one litigant."

And the Court quoted with approval from the decision of Judge Hutcheson in *NLRB* v. *Robbins Tire & Rubber Co.*, 161 F. 2d 798, 800, in part as follows:

> "'The fact alone * * * of which Respondent makes so much, that Examiner and Board uniformly credited the Board's witnesses and as uniformly discredited those of the Respondent, though the Board's witnesses were few and the Respondent's witnesses were many, would not furnish a basis for a finding by us that such a bias or partiality existed and therefore the hearings were unfair.'"

This Court's second decision in *NLRB* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, in which it refused again to reverse the lower court because the lower court, in its second look at the case, "had painstakingly reviewed the record," merely confirms the error of the Court below in failing to review the record and relying instead on the claimed bias of the examiner.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq.*), are as follows:

### Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

### Unfair Labor Practices

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. * * *.

* * * * *

Sec. 8(d). For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incor-

porating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representa-

tive of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

FILED
JUL 3 1954
HAROLD B. WILLEY, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

**No. 124**

LOCAL NO. 3, UNITED PACKINGHOUSE WORKERS OF AMERICA, CIO,

*Petitioner,*

*vs.*

WILSON & CO., INC., A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF OF RESPONDENT, WILSON & CO., INC., IN OPPOSITION TO THE PETITION.

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### OPINION BELOW.

The opinion of the Court of Appeals is reported at 210 F. (2d) 325 and appears in the printed proceedings herein at pages 6-19.[1]

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1. References hereafter will be abbreviated as follows: "R." for "Record"; "P." for "Proceedings"; "App." for "Appendix to Petitioners' Briefs"; and "Pet." for "Petition for Writ of Certiorari."

## JURISDICTION.

The Court of Appeals rendered its decision on February 16, 1954 (P. 6-19). A petition for rehearing was denied March 9, 1954 (P. 35) and the decree of the Court was entered on March 17, 1954 (P. 20). The petition for a writ of certiorari was filed June 8, 1954. Petitioner erroneously seeks to invoke the jurisdiction of this Court under 28 U. S. C. 1254 (1) and Section 10(e) of the Labor Management Relations Act, as amended.

## STATUTE INVOLVED.

The pertinent provisions of the Labor Management Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, Section 151 *et seq.*), hereinafter called the Act, are set forth in the Appendix to this Brief, *infra*, pages 19 to 23.

## QUESTIONS PRESENTED.

The alleged questions presented, as specified by petitioner (Pet. 2), are hereinafter discussed under the heading "Argument". The basic question which must first be considered by this Court is whether petitioner, a labor union, has standing to seek review by this Court of the decision and decree of the Court below denying enforcement of a National Labor Relations Board order, when the Board, the agency charged by Congress with the enforcement of the Labor Management Relations Act, has elected not to petition for a writ of certiorari with respect to such decision and decree.

## STATEMENT OF THE CASE.

### Background of Proceedings.

On December 20, 1946, respondent, Wilson & Co., Inc. (hereafter called "the Company") and the United Packinghouse Workers of America, CIO (hereafter called "the International") entered into a collective bargaining agreement covering employees at seven of the Company's meat packing plants, including those represented by Local 3 at Cedar Rapids, Iowa (App. 1027-1049). This contract would have terminated August 11, 1948, unless renewed (App. 1047). The contract also contained a provision permitting a reopening on wages during the period from August 11, 1947 to August 11, 1948 (App. 1047).

On December 19, 1947, the International notified the Company in writing that it wished to reopen the contract on the question of a general wage increase (App. 1055-1056).

Wage negotiations reached an impasse and the International and the Locals called a strike on March 16, 1948, nearly five months before the expiration date of the contract, and subsequent to the effective date of the Labor Management Relations Act of 1947 (App. 629). The strike continued approximately twelve weeks (App. 250, 992).

### Proceedings Before the Board.

Charges were filed by several Locals, including Local 3, late in 1948 and early in 1949 (R. 4-49), alleging that the Company had refused to reinstate certain individuals after the strike and had discharged certain other individuals in violation of the Act (R. 60; App. 1003). On June 27, 1952, almost four years after the original charges were filed, the National Labor Relations Board (hereafter called "the Board") issued its complaint alleging that the Company

had violated Sections 8(a)(1) and 8(a)(3) of the Act (R. 52-55).

In its answer the Company denied the allegations of the complaint and pleaded that the strike was unlawful in violation of Section 8(d) of the Act, and that the individuals named in the complaint were discharged or denied reinstatement for unprotected activities. The answer also set forth various other affirmative defenses (R. 57-59).

The case was heard before a Trial Examiner of the Board who issued his Intermediate Report finding that the Company had violated Sections 8(a)(1) and 8(a)(3) of the Act as to all individuals named in the complaint (R. 94-131).

The Company filed exceptions to the Intermediate Report (R. 80-82), and on June 30, 1953 the Board issued its decision and order upholding the Trial Examiner's finding, except as to one individual (R. 83-93).

**Proceedings in the Court of Appeals.**

While petitioner filed a petition for review in the Court below under Section 10(f) of the Act as to the individual dismissed by the Board, no contention is made in the present petition with respect to this individual. The Company filed a petition for review of the Board's order in the Court below, under Section 10(f) of the Act, raising therein the defenses set forth in its answer to the Complaint, and in addition the further affirmative defenses that the Company had not been accorded a fair hearing, that certain rulings of the Trial Examiner were prejudicial to the Company, and that the findings of the Board were not supported by substantial evidence on the record considered as a whole (R. 135-142). Answers to both petitions were filed by the respective respondents (R. 143-147). The Board answered the Company's petition and requested enforcement of its order

(R. 145-147). Petitioner, Local 3, was permitted to intervene in the case arising on the Company's petition for the purpose of filing a brief (P. 4), and the two cases were consolidated for all purposes (R. 147-148).

On February 16, 1954 the Court below filed its opinion (P. 6-19), and on March 17, 1954 entered its decree refusing to enforce the Board's order and directing the Board to dismiss the proceedings (P. 20).

**The Decision Below.**

In its opinion the Court of Appeals set forth its several reasons for refusing to enforce the order of the Board (P. 6-19) as follows:

1. Based on the entire record, after having "examined the evidence bearing on * * * the cause of discharge or refusal to reinstate each of the employees named in the complaint" (P. 12), "the finding of the Board that the discharges and failures to reinstate the employees named in the complaint were because of their union activities" was "not sustained by substantial evidence" (P. 15).

In reaching this conclusion, the Court below considered, among other factors, the following:

(a) the failure to sustain the burden of proof which rested upon the Board to establish by substantial evidence "that the discharges or refusals to reinstate the employees involved were prompted by their union activities or affiliations" (P. 12);

(b) "The manifest prejudice, bias and hostility of the examiner as disclosed by an examination of the record" went "far to weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts" (P. 13);

(c) "The evidence considered as a whole, including all the surrounding facts and circumstances, convincingly established that the company had reasonable grounds to believe that the named employees had en-

gaged in the unprotected strike activities," and in reliance upon such belief justifiably refused to reinstate them (P. 15).

2. The strike before the expiration date of the contract between the Company and the Union was unlawful under Section 8(d) of the Act. As to the individuals involved, "by going out on strike before the expiration date of the collective bargaining contract the employees lost their status as employees of the Company and hence, they were not entitled to re-employment as a matter of right" (P. 19).

## ARGUMENT.

### I.

**Petitioner Has No Standing to Seek Review by This Court of the Decision and Decree of the Court Below.**

The Board is the governmental agency charged by Congress with the enforcement of the Labor Management Relations Act in behalf of the public. "Congress has made the Board the only party entitled to enforce the Act." *Nathanson* v. *National Labor Relations Board,* 344 U. S. 25, 27 (1952).

In the instant case the Board sought enforcement of its order in the Court below. However, the Board has now abandoned further enforcement proceedings with respect to such order inasmuch as it did not file a petition requesting review by this Court of the decision and decree below which denied enforcement of said order.

In seeking a writ of certiorari, despite the Board's failure so to do, petitioner is, in substance, attempting to enforce the Board's order contrary to the provisions of the Act as construed by this Court in *Amalgamated Utility Workers* v. *Consolidated Edison Co.,* 309 U. S. 261 (1940).

In the *Amalgamated Utility Workers* case, this Court rejected the proposition, apparently relied upon by the present petitioner, that the Act created private rights and provided for their enforcement in the courts. The petitioning union in that case had instituted a civil contempt proceeding against an employer for alleged failure to comply with a decree enforcing an order of the Board. After full review of the provisions of the Act, including Section 10(e) under which jurisdiction is claimed in the present

case, this Court affirmed the union's lack of standing to press such charges, stating:

> "When the Board has made its order, the Board alone is authorized to take proceedings to enforce it. * * * the Act gives no authority for any proceeding by a private person or group, or by any employee or group of employees, to secure enforcement of the Board's order." (309 U. S. 261, 265-266.)

By its petition for a writ of certiorari in the instant case, petitioner endeavors to substitute itself for the Board in the ultimate enforcement of the Board's order. The decision in the *Amalgamated Utility Workers* case is controlling and compels the denial of the petition. Neither Section 10(e) of the Act, under which jurisdiction is sought to be invoked, nor any other provision confers authority on petitioner to enforce an order of the Board. Lacking such authority, petitioner is without standing to seek review in this Court of the decision and decree below denying enforcement of the Board's order.

It may be suggested by petitioner that its standing to seek review of the decision and decree below is supported by the decision of this Court in *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335 (1945). While the petitioning union in that case obtained review by this Court even though the Board had elected not to seek such review, the case may be readily distinguished. The petitioning union was there attempting to "contest" or overturn an order of the Board. Authority so to do is conferred upon any aggrieved party by Section 10(f) of the Act. In the instant case it is entirely clear that petitioner does not seek, by its petition, to contest or overturn an order of the Board. Indeed, petitioner makes no claim in the petition that it is an aggrieved party entitled to review under Section 10(f) of the Act. To the contrary, peti-

tioner's ultimate objective in this proceeding is enforcement of the Board's order under Section 10(e) of the Act.[2]

Since petitioner, in the circumstances of the instant case, has no standing to seek review by this Court of the decision and decree of the Court below, the petition for a writ of certiorari should be denied.

## II.

### The Decision and Decree of the Court Below Is Based Upon a Review of the Whole Record.

By its questions 2(a), 2(b) and 3[3], petitioner attempts to present for review several separate and independent issues upon which it apparently contends the decision of

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2. In the *Amalgamated Utility Workers* case, this Court stated with respect to these two sources of authority for reviewing orders of the Board as follows:

"* * * Petitioner emphasizes the opportunity afforded to private persons by § 10(f). But that opportunity is given to a person aggrieved by a final order of the Board which has granted or denied in whole or in part the relief sought. That is, it is an opportunity afforded to *contest* a final order of the Board, not to *enforce* it. The procedure on such a contest before the Circuit Court of Appeals is assimilated to that provided in § 10(e) when the Board seeks an enforcement of its order. But that assimilation does not change the nature of the proceeding under § 10(f), which seeks not to require compliance with the Board's order but to overturn it." (309 U. S. 261, 266.)

3. These questions are as follows:

"2. When an employer is charged with an unfair labor practice, under Section 8(a)(1) and (3) of the Act, for refusal to reinstate unreplaced strikers after a strike—

(a) is it a valid defense that the employer believed that the strikers had engaged in misconduct;

(b) must the Board show that the denial of reinstatement was 'for the purpose of discouraging membership in the union'?

"3. Does a trial examiner's uniform acceptance of the testimony for the strikers and uniform rejection of the testimony for the employer prove his 'bias and hostility' and vitiate his findings?" (Pet. 2.)

the Court below may be based.[4] Respondent respectfully submits that such analysis is in error. As heretofore shown, *supra*, page 5, the decision below is based on the Court's careful review of the whole record from which it ultimately concluded that the Board's findings are not supported by substantial evidence. The alleged separate and independent issues which petitioner attempts to present are merely subsidiary findings arrived at by the Court below in reaching its ultimate conclusion.

It is apparent that the review of the record by the Court below was in accordance with the mandate of this Court in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474 (1951). In fact, the decision below quotes from that case (P. 14).

In its review, the Court below considered, as it had the duty to do, that "* * * the burden of proof to establish affirmatively by substantial evidence that the discharges or refusals to reinstate were because of union membership and activities and for the purpose of discouraging membership in the union was upon the Board and this burden at no time shifted to the company." (P. 12.)

The Court below "examined the evidence bearing on this question of the cause of discharge or refusal to reinstate each of the employees named in the complaint." (P. 12.) Thus it followed the procedures described by this Court in *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502 (1951), since it "painstakingly reviewed the record and unanimously concluded that the inferences on which the Board's findings were based were so overborne by evidence calling for contrary

4. This is done despite the contention of petitioner, appearing on page 7 of the petition, that the decision of the Court below is based solely on Section 8(d) of the Act, although conceding it is possible to read the opinion as "also resting on other grounds." The Section 8(d) issue is considered hereinafter at pages 14 *et seq.*

inferences that the findings of the Board could not, on the consideration of the whole record, be deemed to be supported by 'substantial' evidence."

This, in and of itself, is sufficient reason for denying certiorari. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498 (1951).

Petitioner's question 2(a) (see footnote (3) *supra*) suggests its belief that the Court below may have based its decision on the proposition that the employees involved were discharged or refused reinstatement by the Company solely in reliance upon a reasonable belief that they had engaged in unprotected strike activities (P. 15). Petitioner then argues that such ruling is in conflict with decisions of other Courts of Appeals. Discussion of this alleged issue is deemed unnecessary inasmuch as it is obvious from the very words of the Court below that its consideration of this point was not a basis for its decision. In fact, the Court expressly stated: "But quite aside from any proof produced by the company, a consideration of the record as a whole, in our judgment, fails to disclose any substantial evidence that the employees listed in the complaint were either discharged or refused reinstatement because of their union activities." (P. 15.)

Inasmuch as the finding of the Court below on this point was not the basis for its ultimate decision, it is obvious that the alleged issue does not, in fact, present a real and embarrassing conflict of opinion between the Courts of Appeals (*National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502) to warrant the granting of a writ of certiorari.

By its question 2(b) (see footnote (3) *supra*) and supporting argument, petitioner suggests that the statement of the Court below concerning the burden of proof on the Board to establish "by substantial evidence" that the al-

leged discrimination was "for the purpose of discouraging membership in the union" (P. 12) is in conflict with the decision of this Court in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U. S. 17 (1954). This contention is without merit. While this Court in the *Radio Officers' Union* case did decide that "specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3)", (347 U. S. 17, 74 S. Ct. 323, 338), this conclusion followed an earlier finding that the motivation of the employer has been consistently recognized as relevant under both Section 8(a)-(3) and its predecessor (347 U. S. 17, 74 S. Ct. 323, 337).

This Court also stated: "That Congress intended the employer's purpose in discriminating to be controlling is clear" (347 U. S. 17, 74 S. Ct. 323, 337). The proposition was further explained by Mr. Justice Frankfurter in a concurring opinion:

> "In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence which may or may not be sufficient, without more, to show a violation. But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board must take into consideration" (347 U. S. 17, 74 S. Ct. 323, 344).

The Court below applied the principles enunciated in the *Radio Officers' Union* case when it concluded:

> "There was no direct evidence that the acts of the company complained of were prompted by the union activities of the employees *nor are there any proven facts warranting such inference*, and mere suspicion or conjecture can not be accepted as substantial evidence." (P. 15—emphasis added.)

Clearly this alleged issue affords no basis for the granting of a writ of certiorari.

Petitioner in its Question 3 (see footnote (3) *supra*) has attempted to create an issue that the Court below made a finding of bias and hostility on the part of the Trial Examiner based solely upon the action of the Examiner in accepting uniformly the testimony for the strikers and rejecting uniformly the testimony for the employer.

While the finding of the Court below with respect to the bias and prejudice of the Board's Trial Examiner is well warranted by the record, said finding is in any event merely subsidiary to the ultimate conclusion of the Court that the Board's findings and order were not supported by substantial evidence.

The bias and prejudice of the Trial Examiner convinced the Court below that it could not presume the correctness of the trier of facts but had to examine the entire record for itself. Thus it stated: "The manifest prejudice, bias and hostility of the examiner as disclosed by an examination of the record goes far to weaken or destroy the presumption of correctness usually attributed to the findings of the trier of facts" (P. 13).

Petitioner in phrasing its Question 3 (see footnote (3) *supra*) apparently contends that the Court below based the finding of bias and prejudice solely upon "uniform acceptance of the testimony for the strikers and uniform rejection of the testimony for the employer." That this is not a fair appraisal is readily seen from a reading of the opinion below. The full text of the Court's statement is as follows, with the material omitted by petitioner in stating its Question 3 underlined:

> "The uniformity with which the examiner credited the negative testimony offered on behalf of the strikers and discredited the positive testimony offered on behalf of the employer regardless of the fact that the evidence of the employer was corroborated in most instances by the surrounding facts and circumstances, convinces us of his bias and hostility." (P. 12.)

The Court below went on to say:

> "A study of the entire record indicates that this bias and hostility prevails not only in the weighing of the evidence but in the ruling of the court in rejecting pertinent evidence offered by the company." (P. 13.)

Thus a reading of the opinion in full context reveals that the Court below did not rely solely upon uniform acceptance of strikers' testimony and uniform rejection of Company evidence. There is no conflict of the decision below with *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656 (1949).

The alleged question raised by petitioner presents no basis for the issuance of a writ of certiorari.

It is pertinent to observe that the alleged issues discussed above were apparently of insufficient importance from the standpoint of the public to motivate the Board to seek certiorari in this case.

## III.

### The Court Below Correctly Interpreted Section 8(d) of the Labor Management Relations Act.

Petitioner has assumed that the principal basis for the decision of the Court below is Section 8(d) of the Labor Management Relations Act of 1947 (Pet. 5). It then argues that the decision on this issue is "probably incorrect" and is of such major importance as to warrant review by this Court.

Respondent has demonstrated that, after reviewing the entire record, the Court of Appeals rested its decision upon the absence of substantial evidence to support the Board's findings. It is equally clear that the Court's interpretation of Section 8(d) of the Act is correct, and that this issue does not, in any event, warrant review by this Court.

The collective bargaining agreement entered into on December 20, 1946 between the Company and the United Packinghouse Workers of America was, by its own terms, to have remained in effect until at least August 11, 1948 (App. 1047). On March 16, 1948, subsequent to the effective date of the Act and approximately five months prior to the expiration date of said agreement, the unions and the individuals here involved went out on strike to enforce their demands for a general wage increase (App. 629).

The Court below held that "by going out on strike before the expiration date of the collective bargaining contract the employees lost their status as employees of the company and hence, they were not entitled to re-employment as a matter of right" (P. 19).[5]

The provisions of Section 8(d) are set forth in the Appendix to this Brief. The Section clearly requires any party to a collective bargaining agreement who desires to terminate or modify same, to continue such contract "in full force and effect, without resorting to strike or lockout" for a period of sixty days after notice "or until the expiration date of such contract, whichever occurs later."

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5. This has also been determined as a matter of law by the United States District Court for the Northern District of Illinois, Eastern Division, in a proceeding involving the very contract, the very unions and the very strike here involved. In *United Packinghouse Workers of America, et al.* v. *Wilson & Co., Inc.*, 80 F. Supp. 563, 569 (1948), the Court stated with respect to said issue that:

> "* * * the complaint shows on its face that plaintiffs, by 'resorting to a strike' on March 16, 1948 and before the 'expiration date of such contract', have violated the express mandate of Section 8(d) of the Labor Management Relations Act of 1947. Plaintiffs contend that their contract gave them the right to strike during its term. After the passage of the Labor Management Relations Act of 1947, such a contention would be contrary to the express policy of the Act and Section 8 thereof. Contracts, however express, cannot fetter the constitutional authority of Congress. *Norman* v. *Baltimore & Ohio R. R. Co.*, 294 U. S. 240, 307, 55 S. Ct. 407, 79 L. Ed. 885, 95 A. L. R. 1352."

The date which "occurs later" in this case was the expiration date of the contract, or August 11, 1948. It is thus immediately obvious that the unions were required by law to continue their collective bargaining agreement with the Company "in full force and effect without resorting to strike" until at least August 11, 1948. They violated this express Congressional mandate by striking on March 16, 1948.[6]

In an effort to ascribe major importance to the decision of the Court below, petitioner argues that said decision "* * * in effect writes into every collective bargaining agreement a no-strike clause for the duration of the agreement" (Pet. 9). Petitioner then argues that a number of collective bargaining agreements presently in effect do not prohibit strikes for their duration, and, consequently, will be affected by the decision of the Court below interpreting Section 8(d).

The fact that many collective bargaining agreements may not expressly prohibit strikes during their terms cannot possibly be of consequence in determining the meaning of the plain and unambiguous words of Section 8(d). Even petitioner concedes that Section 8(d)(4) is "susceptible of the interpretation given it by the Court below: that is the literal interpretation" (Pet. 11). Petitioner, however, seeks to accomplish a change in the requirements of the Section by judicial interpretation. As observed by the Court below, if the requirements of the Section are to be altered, arguments such as urged by petitioner should properly be, and apparently have been, addressed to the Congress (P. 17).

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6. To the extent that resort to legislative history is deemed desirable in the proper interpretation of the Section, "despite the plain wording of the statute", the Court below has convincingly demonstrated that such history in fact supports its interpretation (P. 17-18).

Petitioner relies upon the decision of the Board in *United Packinghouse Workers of America, CIO, and Wilson & Co.*, 89 NLRB 310 (1950), in support of its suggested interpretation of Section 8(d). The language quoted from that opinion appearing on page 13 of the petition is sufficient to demonstrate that the Board reached its decision on the basis of what it thought the law should be, rather than on the basis of the statute as actually enacted by Congress. Moreover, it is appropriate to observe that, despite the Board's decision referred to, the present Board has not petitioned for a writ of certiorari to review the contrary interpretation of Section 8(d) by the Court below.

The Section 8(d) issue clearly lacks such public importance as to warrant the granting of a writ of certiorari.

## CONCLUSION.

For the reasons stated herein, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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*Wilson & Co., Inc.*

## APPENDIX.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to

agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed

as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

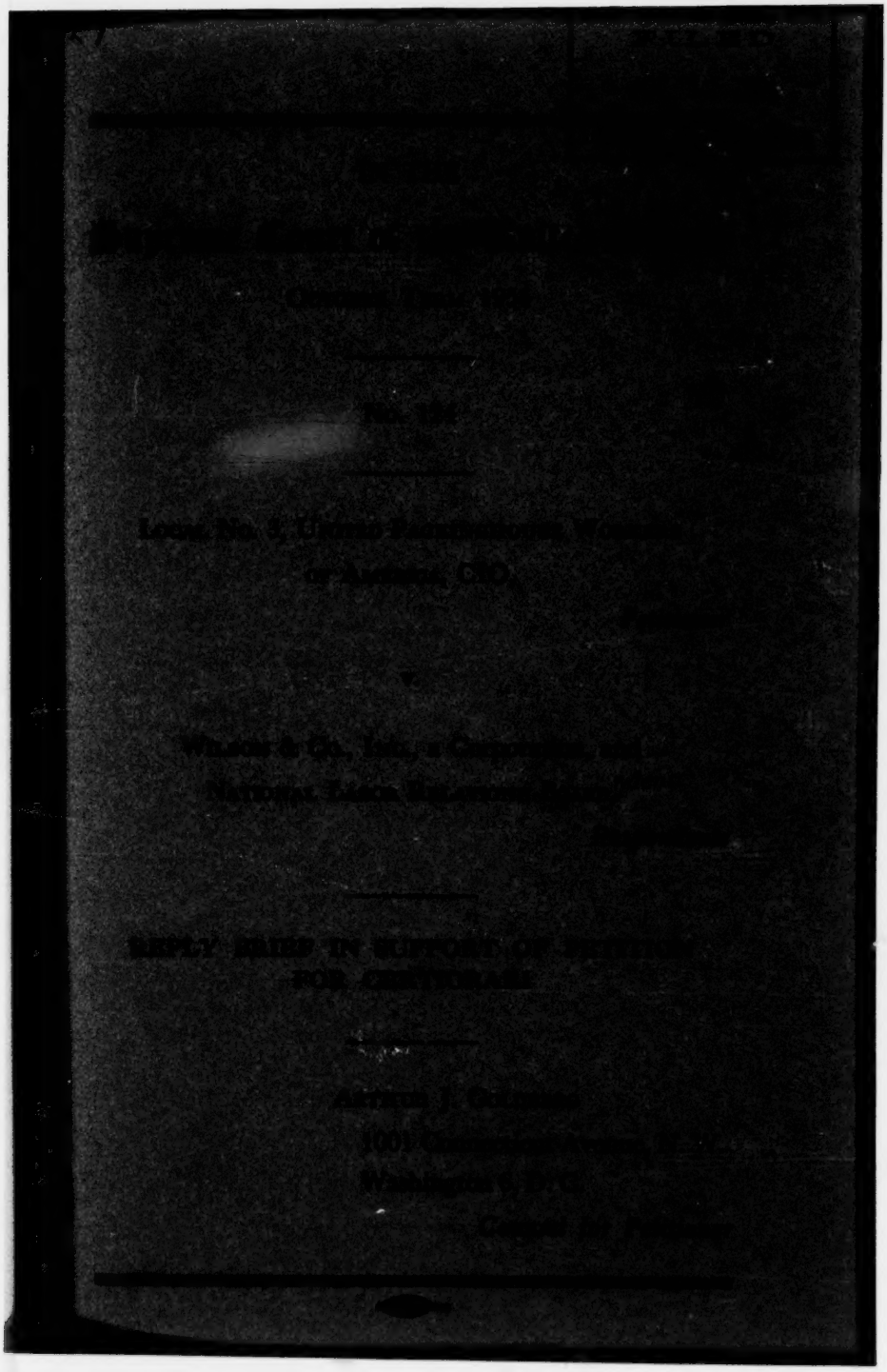
* * * * *

Sec. 10(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or

neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Sec. 10(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding,

certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.



IN THE

# Supreme Court of the United States

OCTOBER TERM 1954

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No. 124

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LOCAL NO. 3, UNITED PACKINGHOUSE WORKERS OF AMERICA, CIO,

*Petitioner*

v.

WILSON & CO., INC., a Corporation, and

NATIONAL LABOR RELATIONS BOARD,

*Respondents*

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## REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Brief in Opposition of Respondent, Wilson & Co., Inc., argues, *inter alia,* that Petitioner has no standing to seek review by this Court (Petition pp. 7-9). This Reply

Brief will deal only with this contention, which was not discussed in the Petition.

**PETITIONER HAS STANDING TO SEEK REVIEW**

The Company asserts that Petitioner, although it was allowed to intervene in the Court below, has no standing to seek review of the decision and decree below denying enforcement of the Board's order. This conclusion is asserted to follow from this Court's holding in *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, that an intervening union does not have standing to press a charge of contempt against an employer, because only the Board may seek enforcement of its order.

However, in *International Union of Mine, Mill and Smelter Workers* v. *Eagle-Picher Mining & Smelting Co.*, 325 U. S. 335, this Court squarely held that an intervening union has standing to seek review by this Court of a court of appeals' decision rejecting a Board petition. This Court said (325 U. S. at 338-339):

> "They [the employers] also attack the standing of the petitioners to seek review by this court when the Board, the body charged with the enforcement of the National Labor Relations Act, has elected not to seek review. We think that, in the circumstances disclosed, the petitioners, though they could not have instituted enforcement proceedings,[1] had standing to seek review of the order denying the Board's petition."

The *International Union* decision thus completely dis-

[1] At this point the Court cited the *Amalgamated Utility Workers* case and other similar decisions.

poses of any question as to Petitioner's standing to seek review.

The Respondent Company states (Brief p. 8) that the *International Union* case "may be readily distinguished" because "The petitioning union was there attempting to 'contest' or overturn an order of the Board." This assertion is flagrantly misleading. In the *International Union* case the intervening unions supported the Board's petition for enforcement when the case was first before the court of appeals, and the enforcement decree sought by the Board and the unions was entered (325 U. S. at 337). Two years later the Board decided that the method of computing back pay specified in the decree should be changed, and petitioned the court to vacate that portion of the decree and remand the case to the Board (325 U. S. at 338). The unions again intervened in support of the Board's petition. The court, however, dismissed the petition to vacate the decree. "The Board did not apply for certiorari but the intervening unions whose petition had also been dismissed applied for the writ." (325 U. S. at 338.)

That case is thus on all fours with the present. The intervening unions took the same position as the Board at each step of the proceeding, and when the Board did not apply for certiorari after the second decision the unions sought (and secured) review. To say, as does the Respondent Company, that, because the second petition of the Board and the unions asked modification of the decree originally secured, the union was "attempting to 'contest' or overturn an order of the Board" is, at the least, disengenuous.

## CONCLUSION

For the reasons stated in the Petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1954

# In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 124

LOCAL NO. 3, UNITED PACKINGHOUSE WORKERS OF AMERICA, CIO, PETITIONER

*v.*

WILSON & CO., INC., A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the court below (P. 7–19)[1] is reported at 210 F. 2d 325. The findings of fact, conclusions of law, and order of the Board (R. 83–131) are not reported.

[1] References to the printed volume, labeled "Record," which contains the pleadings and the Board's decision and order are designated "R." References to the volume, labeled "Proceedings," which contains the opinion and various orders of the court below are designated "P."



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## JURISDICTION

The decision of the court below was entered on February 16, 1954 (P. 6–19), and its decree on March 17, 1954 (P. 20). Petitioner's petition for rehearing and the Board's motion for clarification of the opinion were denied on March 9, 1954 (P. 35, 37). The petition for a writ of certiorari was filed on June 7, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended.

## STATUTE INVOLVED

The pertinent statutory provisions are reprinted in the Petition, pp. 26–28.

## DISCUSSION

Following an economic strike at plants operated by Wilson & Co., hereinafter called the Company, at Cedar Rapids, Iowa, and Faribault and Albert Lea, Minnesota, the Company refused to reinstate a number of the strikers although their positions had not been filled by replacements. In the ensuing unfair labor practice proceeding the Board found that the refusal to reinstate the strikers violated Section 8 (a) (3) and (1) of the Act (R. 87, 97–129). In so finding the Board rejected, *inter alia,* the Company's contentions that the employees engaged in misconduct for

which they could properly be denied reinstatement, and that the strike was called in violation of Section 8 (d) of the Act so that the strikers forfeited their status as employees (R. 87, 97–129).

The court below set aside the Board's order, but—as the petition correctly states (pp. 5–6, 7, 17)—the basis for the court's decision is not altogether clear. The court in its opinion discusses three questions—whether the employer's good faith belief that the employees engaged in misconduct established that he was not guilty of unlawful discrimination; whether the employees in fact engaged in such misconduct as to forfeit their rights under the Act; and whether the strike was called in violation of Section 8 (d). The decision does not appear to rest exclusively on any one of these questions.

We agree with petitioner that the question of the interpretation of Section 8 (d) is one of real importance in the administration of the Act, and we would welcome authoritative resolution of that question. The Board did not itself ask for a resolution of the question in this case because it appeared doubtful that the decision of the court below necessarily rested upon an interpretation of Section 8 (d). Similarly, it is not clear that the decision of the court below as to the em-

ployer's good faith belief necessarily conflicts with the decision in *National Labor Relations Board* v. *Industrial Cotton Mills,* 208 F. 2d 87 (C. A. 4), certiorari denied, 347 U. S. 935.[2]

However, if this Court should consider that the case sufficiently presents the questions stated in the petition, the questions are of such a nature and importance as to warrant review by this Court.

Respectfully submitted.

SIMON E. SOBELOFF,
*Solicitor General.*

GEORGE J. BOTT,
*General Counsel,*
*National Labor Relations Board.*

JULY 1954.

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[2] See p. 10, n. 4, of our brief in opposition to the petition filed in the *Industrial Cotton* case, No. 582, October Term 1953.

U. S. GOVERNMENT PRINTING OFFICE: 1954

# In the Supreme Court of the United States

OCTOBER TERM, 1954

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No. 124

LOCAL NO. 3, UNITED PACKINGHOUSE WORKERS OF AMERICA, CIO, PETITIONER

*v.*

WILSON & CO., INC., A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

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**SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD**

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Following the filing of the petition for a writ of certiorari herein and the memorandum of the National Labor Relations Board, the Board, on August 5, 1954, issued its Decision and Order in *Lion Oil Company*, 109 NLRB No. 106. This decision, setting forth the Board's present view of Section 8(d) (4) of the National Labor Relations Act, bears upon question No. 1 stated in the petition,

and for that reason we believe it should be brought to the Court's attention. The text of the decision is set forth in the Appendix, *infra*, pp. 5-43.

In the *Lion Oil* case the Board reexamined and modified its earlier view with respect to Section 8(d)(4) which it had set forth in *United Packinghouse Workers*, 89 NLRB 310 and followed in the instant case. In brief, the Board's earlier view was that Section 8(d)(4) prohibits a strike to secure modification or termination of a collective bargaining agreement for a period limited to 60 days after notice of the proposed modification was given, whether or not the contract had expired. The court below rejected this interpretation, concluding that Section 8(d)(4) prohibits a strike for such purpose until the expiration of 60 days after notice or the termination of the entire contract, whichever occurred later. In the *Lion Oil* case the Board concluded that the 60-day notice period is not the maximum waiting period but that the waiting period extends until the "expiration date" of the contract. Accordingly, under this view, if the notice is given more than 60 days before the expiration date, the expiration date becomes the critical date prior to which no strike is lawful. If the notice is given less than 60 days before the expiration date, then the 60-day period extending beyond the expiration date is controlling.

The Board further held, however, that the term "expiration date" is used in the statute to mean not only the terminal date of a contract, but also any earlier agreed modification date. Under this con-

struction if the contract is for a fixed term with no provision for reopening, the expiration date is the actual terminal date. If, on the other hand, the contract provides for modification upon notice at some date earlier than its termination, the "expiration date" is the earliest date on which such modification could be effective. The same rule would apply to a contract, as in the instant case, for a fixed term providing for a wage reopening during a prescribed period.

The interpretation of Section 8(d)(4) which the Board thus adopted in the *Lion Oil* case was not, of course, presented by the Board to the Court of Appeals for the Eighth Circuit. However, it may be noted, even under the *Lion Oil* construction of the Act the conclusion reached by the Board in the instant case, that the strike conformed to the requirements of Section 8(d)(4) and therefore was lawful, would be the same. The contract here, dated December 20, 1946, was to remain in effect until August 11, 1948, and from year to year thereafter. It provided for a reopening on the issue of wages "once during the period from the date hereof, to August 11, 1947, and once during the period from August 11, 1947 to August 11, 1948 by written notice * * * thirty (30) days prior to the date on which it is desired to commence negotiations." Under the *Lion Oil* decision the "expiration date" of the contract after August 11, 1947, for purposes of Section 8(d)(4), would be the earliest date on which modification could be effective, that is, thirty days after notice of reopening

was given. The Union gave such notice on December 19, 1947, and did not go on strike until March 16, 1948, or more than 60 days after the "expiration date" of the agreement. Accordingly, if either the Board's earlier or its present interpretation of Section 8(d)(4) be accepted, the decision of the Court of Appeals that the strike failed to satisfy the requirements of that section is erroneous.

Respectfully submitted,

SIMON E. SOBELOFF,
*Solicitor General.*

GEORGE J. BOTT,
*General Counsel,*
*National Labor Relations Board.*

SEPTEMBER 1954.

APPENDIX

## UNITED STATES OF AMERICA

## BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case No. 15-CA-488

LION OIL COMPANY

and

OIL WORKERS INTERNATIONAL UNION, CIO

### DECISION AND ORDER

On July 30, 1953, a majority of a Panel of the Board issued Proposed Findings of Fact, Proposed Conclusions of Law, and Proposed Order in the above-entitled case, finding that the Respondent had engaged in certain unfair labor practices and ordering that it cease and desist therefrom and take certain affirmative action as set forth in the Proposed Findings, Conclusions, and Order, attached hereto. Thereafter the Respondent filed exceptions to the Proposed Findings, Conclusions, and Order, a supporting brief, and a request for oral argument. On September 24, 1953, at Washington, D. C., the Board heard oral argument in which the Respondent, the charging Union, and the General Counsel participated.

Thereafter, in the light of the exceptions, brief, and oral argument, the Board has reviewed the Proposed Findings, Conclusions, and Order and only insofar as they are consistent with this De-

cision and Order hereby adopts the Panel's Proposed Findings, Conclusions, and Order.

1. The first issue that must be decided in this case involves interpretation of the notice provisions of Section 8 (d) of the Act. The Respondent contends that the Union failed to observe the waiting requirements of that Section before striking to enforce its demands, and that by such conduct it removed the striking employees from the protection of the Act. We do not agree.

The pertinent facts are not in dispute. In 1950 the Respondent and the Union entered into a collective bargaining contract which by its terms was to remain in effect until October 23, 1951, and was to continue in force thereafter for an indefinite period, subject to cancellation on notice by either party. Specifically, the duration clause permitted 60 days' notice to amend on or after August 24, 1951, and if the parties did not agree on a new contract after that period, a further 60 days' notice to terminate the contract completely.[1]

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[1] "This agreement shall remain in full force and effect for the period beginning October 23, 1950, and ending October 23, 1951, and thereafter until cancelled in the manner hereinafter in this Article provided.

"This agreement may be cancelled and terminated by the Company or the Union as of a date subsequent to October 23, 1951, by compliance with the following procedure:

> "(a) If either party to this agreement desires to amend the terms of this agreement, it shall notify the other party in writing of its desire to that effect, by registered mail. No such notice shall be given prior to August 24, 1951. Within the period of 60 days, immediately following the date of the receipt of said notice by the party to which

On August 24, 1951, the Union notified the Respondent and the Federal Mediation and Conciliation Service of its desire to amend the contract and of the existence of a labor dispute, and sent a copy of its letter to the State Labor Commissioner for the State of Arkansas. Negotiations on modification of the contract began on August 29, 1951. On February 14, 1952, the employees voted to strike and notified the Respondent. The strike, after several postponements, occurred on April 30, 1952. On June 21, 1952, the employees offered to return to work, and the Respondent refused to reinstate them. A new contract and a strike settlement were executed on August 3, 1952, and on August 4, the strikers began to return to work.

The August 24, 1951, notices of the existence of a labor dispute were adequate in content and destination to meet the formal requirements of Section 8 (d), and we so find. The issue then is whether the Union's resort to economic action was so timed with respect to the notices as to satisfy the waiting period set out in the Section. Because of the importance of this issue and because the Section since its enactment has so seldom required construction

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notice is so delivered, the Company and the Union shall attempt to agree as to the desired amendments to this agreement.

"(b) If an agreement with respect to amendment of this agreement has not been reached within the 60-day period mentioned in the subsection immediately preceding, either party may terminate this agreement thereafter upon not less than sixty days' written notice to the other. Any such notice of termination shall state the date upon which the termination of this agreement shall be effective."

by the Board, we deem some general comment on its meaning advisable. The pertinent language of the Section is set out below.[2]

The fundamental purpose of the Section is to assure that, once parties have stabilized their bargaining relationship by entering into a contract,

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[2] Section 8 (d)

. . . Where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such a termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

. . . Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of Sections 8, 9, and 10 of this Act, as amended, . . .

the stability achieved will not be placed in jeopardy by strikes or lockouts. It is for this reason that the Section provides for a waiting period before strike or lockout action by the parties. Clearly, Congress was interested in establishing an orderly procedure for contract negotiations and in preventing the industrial unrest that is the natural consequence of the failure of parties to abide by their collective bargaining agreements.[3]

With the Congressional purpose as a background, we advert to the language itself of Section 8 (d). It is to be noted that the initial phrase of the notice provisions contained in the Section, which necessarily applies to all the following sub-divisions, reads: "Where there is in effect a collective bargaining contract covering employees * * * no party * * * shall terminate or modify such contract, unless * * *" Thus, the plain wording of the Section makes the required notices mandatory at all times when collective bargaining agreements are in effect, not only when a party desires to terminate but equally when a party seeks to modify

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[3] It is evident from the legislative history of the 1947 amendments to the Act, which include Section 8 (d), that Congress was generally concerned with promoting industrial peace by having parties adhere to collective bargaining agreements. Thus, the Senate Committee on Labor and Public Welfare in its report among other things said: "Statutory recognition of the collective agreement as a valid and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties of such agreements, and will thereby promote industrial peace." S. Rep. No. 105 on S. 1126, p. 17.

a contract.[4] It is argued that the notice provisions of the Section are applicable only when a contract is about to end. It would be futile, however, in our opinion, to require a waiting period for strikes and lockouts only at a time when the parties are already on notice, by virtue of their own agreement, of the imminence of termination. That such limited view could not have been the Congressional intent is not only shown by the plain and unambiguous language set out above, but also by the fact that there is no logical distinction—in the perspective of the Congressional objective of promoting industrial peace—between one period of a contract and another. Certainly, it is as desirable to discourage interruptions to the free flow of commerce arising from labor disputes during the life of a bargaining agreement as at or near its termination.

Turning now to the situation presented by the instant case, the critical provision is 8(d) (4), which provides that the employer and union shall continue in effect the existing contract, without resorting to strike or lockout for "sixty days after such notice is given or until the expiration date, *whichever occurs later*" (emphasis supplied). It is urged that, despite the plain wording of the statute,

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[4] Senator Ball, a proponent of Section 8 (d), said: "The provision . . . provided that where a contract between a union and an employer is in existence, fulfilling the obligation on both sides to bargain collectively means giving at least 60 days' notice of the termination of the contract, *or of the desire for any change in it*, is another provision aimed primarily at protecting the public, as well as the employee, who have been the victims of 'quickie' strikes." (emphasis supplied) Cong. Rec., May 12, 1947, p. 5146.

Congress intended that 60 days constitute the maximum waiting period before strike or lockout. We are unable to agree. If that had been the intent, there would have been no point in Congress inserting in 8 (d) (4) the phrase "until the expiration date" or the additional phrase "whichever occurs later." The language of 8 (d) (4) is not ambiguous and cannot be amended or rewritten by administrative interpretation. Moreover, if resort be had to legislative history, it appears that Senator Taft, the co-author of the Act, made it clear that 8 (d) (4) requires a waiting period before strike or lockout during the life of a contract when he said: "If such notice is given, the bill provides for no waiting period except during the life of the contract itself." [5]

Our primary problem, it seems to us, therefore, is to ascertain what Congress meant by "expiration date" in this context. Once this is determined as applied to the various types of contracts in use in the labor field, our task is greatly simplified, since we then have discovered a fixed pole against which to measure the waiting period. That is to say that the application of Section 8 (d) (4) then becomes a matter of simple arithmetic. If the notice is given more than 60 days before the ex-

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[5] Cong. Rec., April 23, 1947, p. 3952. The Senate Minority Report, in objections to Section 8 (d) stated: "Since not every collective bargaining contract contains a no-strike clause, the effect of the proposal is to incorporate such provisions by legislative fiat." S. Min. Rep. No. 105, Pt. 2, on S. 1126, p. 22. It is significant that notwithstanding this contention, the section was passed by Congress in its present form.

piration date, the expiration date becomes the critical date prior to which no strike or lockout is lawful; likewise, if the notice is given less than 60 days before the expiration date, then the 60-day period extending beyond the expiration date is controlling.

If Section 8 (d) is considered both in the framework of industrial reality [6] and in the perspective of the Congressional purpose to protect the stability of collective bargaining agreements against strikes and lockouts during the life of the contract, it becomes clear that Congress used the term "expiration date" to signify the date in the course of a labor contract when the contract, by its own terms, is subject to either modification or termination, regardless of whether notice is required explicitly by the agreement. The term "expiration date" as used in Section 8(d) (4) thus has a twofold meaning; it connotes not only the terminal date of a bargaining contract, but also an agreed date in the course of its existence when the parties can effect changes in its provisions.

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[6] For example, the Board with Court approval has held that with respect to Section 8 (d) notice of intention to modify a bargaining contract in substantial respects is the equivalent of notice to terminate. *J. W. Woodruff, Sr. d/b/a Atlanta Broadcasting Company*, 90 NLRB 808, 811, enforc'd 193 F. 2d 641 (C.A. 5); *Great Bear Logging Company*, 59 NLRB 701, 703; *American Woolen Company*, 57 NLRB 647, 649; *Atlas Felt Products Company*, 68 NLRB 1, 3; *William Barnett & Son, Inc.*, 74 NLRB 81, 82, 83. *Accord: Moran Shoe Co. and United Shoe Workers, Local 200-A, 2 Amer. Labor Arbitration Awards*, 67, 880 (Sept. 25, 1947); *Anderson* v. *Tuomi, et al.*, 230 Minn. 490, 42 N. W. 2d 204.

Under this view, the expiration date of a fixed term contract with no provisions for reopening is the actual terminal date. In this connection, we do not say that Congress intended by Section 8 (d) to convert contracts for fixed terms into contracts at will, terminable on 60 days' notice. The "expiration date" of a contract containing an automatic renewal clause—*i.e.,* an agreement subject to modification or termination upon notice at fixed annual periods—is the earliest date on which modification or termination could be effective. We think the same rule applies to a contract for a fixed term providing for a wage reopening at a prescribed period. Similarly, in contracts of indefinite duration, which are rare in labor relations, the 60 day notice to modify or terminate would fix the period during which lockouts and strikes are proscribed.

Our dissenting Member, Mr. Murdock, characterizes this interpretation of the Statute as reading a no-strike clause into every contract. This characterization misapprehends the purport of our decision. Our interpretation preserves the right to strike in all circumstances where the parties have provided in their agreement for negotiating substantial changes in its provisions—if the statutory requirements of Section 8 (d) are met. Moreover, our decision has no bearing on the right to strike for reasons and purposes other than to obtain contract modification or termination. We say only that strikes to alter the provisions of a firm contract of fixed duration, and containing no provision for modification, must await the termination date.

Member Murdock's interpretation of Section 8 (d) destroys, in our opinion, the obligation of the parties to abide by the terms of a collective bargaining agreement. For he would permit strikes and lockouts to force changes in the terms of a bargaining agreement at any time during its lifetime, rather than only at such time as was contemplated by the parties when they entered into the agreement. In fine, Member Murdock's interpretation defeats the Congressional purpose of promoting stability in bargaining relationships.

Our holding, moreover, supports the prime objective of the Act as a whole, to encourage the "practices and procedures of collective bargaining". It has been stated too often to bear repetition that the ultimate achievement of collective bargaining is the contract itself. If, as we believe, Congress, in the 1947 Amendments to the Act, deemed it wise through Section 8 (d) to insist upon adherence to fixed contracts voluntarily negotiated and executed, its step only furthered the basic purpose of the Act itself. Nor, in the light of experience, is our construction inconsistent with the actualities of industrial life. Contracts for fixed periods are not made to be broken. That the intention to be bound by the established expiration date is ever present during negotiations is conclusively evidenced by the stress always placed in contract negotiations on wage reopening—or other modification—clauses. These clauses, now almost universal in bargaining contracts exceeding one year in duration, are in effect qualifying reservations of

the privilege to economic action at dates earlier than the final terminal day.[7]

On this point, we feel that we should comment on the critical significance which Member Murdock attaches to the differences between contractually provided notices to modify and notices to terminate.[8] The inconsistency between such a view and the salutary purposes of the entire Section is especially illustrated by this very case. Thus, under Member Murdock's interpretation, we take it that the Union was free to strike without giving any notice whatsoever in August, 1951, since this was presumably not "around the expiration date of the contract." This is apparently so for the reason that the contract had no fixed expiration date. However, our colleague would further hold that, having given notice to modify, the Union by its own action in seeking to comply with 8 (d) (at a time when he thinks it was not required by 8 (d) to do so) created an obligation to give a second notice and then await the final termination of the agreement before it could lawfully strike. In short, the Union, under his interpretation, could have

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[7] In discussing the union's duty to bargain as set out in Section 8 (b) (3) and 8 (d) of the 1947 Amendments, Senator Morse said: "A contract has been signed, and I take the position this afternoon, as I have taken the position in many cases, that the union, once it signs a contract has no right to strike during the life of the contract if the strike is to force a change in the terms of the contract."

[8] As noted above, the Board has repeatedly refused to distinguish between notice to modify and notice to terminate, considering them for the purposes of Section 8 (d) one and the same thing.

struck without any notice in August, but, by virtue of giving the notice, and having exhausted all the mediating and negotiating requirements of Section 8 (d) could not lawfully strike the following April.

We cannot accept this proposition. In our opinion, (1) this view would encourage resort to "quickie" strikes and lockouts in the middle of a contract term, (2) it would encourage the termination of contracts as opposed to their modification, and (3) it would penalize a union which withholds strike action for a protracted period in an effort to reach agreement rather than merely observing the minimum waiting period provided in the Statute. We are certain that Congress did not intend that Section 8 (d) should have such unsettling results.

It suffices for our decision here that the contract specifically provided for modification and that the earliest date on which modification could be made effective was October 23, 1951. The notice was given precisely 60 days before that date. As the notice was served on August 24, the end of the 60 days statutory period and the date fixed in the contract for making modifications (which, as indicated above, we consider tantamount to "expiration" as that term is used in Section 8 (d) (4)) coincided.[9] Thus, the Union, before striking to enforce its economic demands satisfied the statutory requirements, and consequently the striking employees never lost the protection accorded economic strikers by the Act.

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[9] See *American Lawn Mower Company*, 108 NLRB No. 215.

Our decision in this case is not inconsistent, we believe, with the interpretation which the Court of Appeals for the Eighth Circuit placed upon Section 8 (d) in its opinion in the *Wilson* case. *Local No. 3, United Packinghouse Workers of America, CIO* v. *National Labor Relations Board,* 210 F. 2d 325, 331-333. In that case, a strike was called more than 60 days after the giving of notices of the kind required by Section 8 (d), but before the expiration date of a contract between the Company and the Union. A majority of the Board in the *Wilson* case had concluded that Section 8 (d) prohibits a strike to secure modification or termination of a contract only for a period limited to 60 days after the notices required by the Section have been given, and had held that the strike in question did not contravene the Section because the 60 day waiting period had been satisfied. The Court of Appeals believed, however, that the strike contravened Section 8 (d) because it occurred before the expiration date of the bargaining contract. Because of the basis on which the Board decided the *Wilson* case, the construction of 8 (d) which we adopt here was not presented by the Board to the Court. Leaving aside the effect of the wage reopener, we agree with the view of the Court of Appeals, consistent with the opinions expressed herein, that the 60-day notice period is not the maximum waiting period. Subject to the construction which we have given to Section 8 (d) here, we adopt the view that the waiting period extends until the "expiration date" of the contract.

In this case, it is clear that the statutory waiting period has here been satisfied since the strike herein occurred after the "expiration date" of the parties' agreement had passed.

* * *

Dated, Washington, D. C., August 5, 1954.

Guy Farmer, Chairman; Philip Ray Rodgers, Member; Albert C. Beeson, Member,
*National Labor Relations Board.*

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IVAR H. PETERSON, MEMBER, Concurring:

I agree with Chairman Farmer and Members Rodgers and Beeson in their ultimate findings that the Union complied with the applicable terms of Section 8 (d) of the Act and that the Respondent violated Section 8 (a) (1), (3) and (5) of the Act. However, in my view they adopt an artificial interpretation of the provision in paragraph (4) of Section 8 (d), which requires maintenance of the contractual terms and conditions, without resort to strike or lockout, "for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later."

It seems apparent to me that the prime purpose of Congress in enacting Section 8 (d) was to prevent "quickie" strikes or precipitate lockouts designed to secure the modification or termination of collective bargaining agreements. To accomplish

this purpose, Congress established a mandatory 60-day "cooling off" period during which either party to a labor agreement is forbidden to resort to economic action to enforce its demands for modification or termination of the contract. In my opinion, the duty to maintain the contractual status quo for 60 days attaches *whenever* the parties enter into negotiations to modify or terminate a contract. That was the reasoning of the Board majority in the *Wilson* case,[10] and I would adhere to it.

By giving the term "expiration date" a specialized meaning, for which I find no warrant in the Act or its legislative history, my colleagues in the majority establish a "fixed pole" against which the waiting period is to be calculated or measured. They say "expiration date" means "the date in the course of a labor contract when the contract, by its own terms, is subject to either modification or termination." They then hold that if a notice is given more than 60 days before the expiration date, as they define the term, the obligation to refrain from economic action continues until the expiration date is reached. Thus, the "cooling off" period is enlarged beyond 60 days, and the effect is to hold strikes occurring more than 60 days after notice but before the contract expiration date to be unfair labor practices. But Congress in Section 13 stated that nothing in the Act, "except as specifically provided for herein, shall be construed so

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[10] 89 NLRB 310.

as to interfere with or impede or diminish in any way the right to strike. Moreover, it seems to me that Section 8 (d) itself, in stating that an employee loses his employee status if he "engages in a strike within the sixty-day period specified in this subsection," indicates that Congress intended the "cooling off" period to be *only* 60 days in duration rather than a flexible period of 60 or more days depending on the time interval between the date notice is given and the contract "expires." Therefore, I do not think the Board would be warranted in interpreting Section 8 (d) so as to impair the right to strike for periods in excess of 60 days following the giving of notice.

I readily concede that my construction of paragraph (4) of Section 8 (d) does not give full effect to its literal language. As written, and viewed in isolation, that paragraph appears to require the maintenance of the contractual status quo until the expiration date of the contract—even though notice was given more than 60 days earlier—if the expiration date "occurs later" than the end of the 60-day period calculated from the date notice was given. But I think the result which follows from such a literal interpretation operates to write into many labor contracts a no-strike clause of substantially longer duration than 60 days, contrary to the intention of Congress, as expressed in the other paragraphs of this section, and elsewhere. I think such an extension of the statutory limitation on the right to strike can be avoided by construing the phrase

"whichever occurs later" as having specific reference to a situation in which notice of desire to modify or terminate was given *less* than 60 days before the termination date of the contract. I believe Congress wished to make clear that in such a case the 60-day "cooling off" period should be observed before economic action could be taken, even though it extended beyond the end of the contract. As pointed out by Senator Taft (Cong. Rec., April 23, 1947, p. 3955), if a party "waits, let us say, until 30 days before the end of the contract to give the notice, then there is a waiting period provided during which the strike is an unlawful labor practice for 60 days from that time, or to the end of the contract and 30 days beyond that time."

Applying my view of Section 8 (d) to the facts of this case, I would hold that the notice of desire to amend given by the Union on August 24, 1951, was adequate to meet the requirements of Section 8 (d). As the strike in support of this demand did not occur until April 30, 1952, 8 months after the giving of notice, there can be no question that the Union fully met the 60-day waiting period. Therefore, the strikers did not lose their status as employees, but on the contrary were entitled to the protection of the Act.

In addition to the reasons set forth in the main opinion, I would find that the Respondent's refusal to recognize the continuing existence of the contract and its refusal to permit the Union to administer it during the strike, are further grounds

for finding that the Respondent violated Section 8 (a) (5) of the Act.

Dated, Washington, D. C.

Ivar H. Peterson, Member,
*National Labor Relations Board.*

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ABE MURDOCK, MEMBER, dissenting:

I cannot agree with my colleagues in their interpretation of Section 8 (d) of the Act. In view of my interpretation of that section, the Union did not comply with it, and I am led to the ultimate conclusion that the complaint should be dismissed in its entirety.

In 1950 the Respondent and the Union executed a contract containing the following provisions with respect to the duration of the agreement.

> Article I
>
> "This agreement shall remain in full force and effect for the period beginning October 23, 1950, and ending October 23, 1951, and thereafter until canceled in the manner hereinafter in this Article provided.
>
> "This agreement may be canceled and terminated by the Company or the Union as of a date subsequent to October 23, 1951, by compliance with the following procedure:
>
> "(a) If either party to this agreement desires to amend the terms of this agree-

ment, it shall notify the other party in writing of its desire to that effect, by registered mail. No such notice shall be given prior to August 24, 1951. Within the period of 60 days, immediately following the date of the receipt of said notice by the party to which notice is so delivered, the Company and the Union shall attempt to agree as to the desired amendments to this agreement.

"(b) If an agreement with respect to amendment of this agreement has not been reached within the 60-day period mentioned in the subsection immediately preceding, either party may terminate this agreement thereafter upon not less than sixty days' written notice to the other. Any such notice of termination shall state the date upon which the termination of this agreement shall be effective."

The contract did not contain a no-strike clause.

On August 24, 1951, the Union notified the Respondent and the Federal Mediation and Conciliation Service of its desire to amend the contract and of the existence of a labor dispute, and sent a copy of its letter to the State Labor Commissioner for the State of Arkansas. Negotiations on modification of the contract began on August 29, 1951. On February 14, 1952, the employees voted to strike and notified the Respondent. The strike, after several postponements, occurred on April 30, 1952. On June 21, 1952, the employees offered to

return to work, and the Respondent refused to reinstate them. A new contract and a strike settlement were executed on August 3, 1952, and on August 4 the strikers began to return to work.

On April 30, 1952, the date of the strike, the contract was in "full force and effect." With this finding the parties are in agreement. According to the provisions of the contract, it became one with no specific expiration date after October 23, 1951, *unless canceled* in the manner provided for in the contract. The method of termination is clearly defined in the contract. Either party desiring to amend the contract was to give such notice not earlier than August 24, 1951, sixty days before October 23, 1951. If agreement on modification was not reached within the 60-day period, the contract became one terminable upon the giving of 60-day notice of termination by either party. The record discloses that neither party gave the notice to *terminate* provided for by the contract, and thus it continued in effect up to August 3, 1952, when a new contract was executed.

Section 8 (d) of the Act not only provides certain standards by which the Board must determine whether employers and labor organizations have fulfilled their duties to bargain collectively under the Act, but it also provides for the loss of empoyee status, for the purpose of the Act, to those employees covered by a contract who strike under certain conditions. The relevant portions of Section 8 (d) pertinent to a situation where a contract is in existence are as follows:

" . . . Where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such a termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such

notice is given or until the expiration date of such contract, whichever occurs later:

". . . Any employee who engages in a strike within the sixty day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of Sections 8, 9, and 10 of this Act, as amended. . ."

The proviso of Section 8 (d), in my opinion, applies only to the period around the expiration date of a contract and does not apply earlier during the term of a contract. The proviso enumerates the duties of contracting parties when they seek to terminate, renew, or renegotiate a contract for a fixed period *upon the expiration of its term or when they seek to terminate or modify a contract of indefinite duration;* it does not define the obligations of contracting parties with respect to changing the provisions of a contract *during its term.* The proviso only directs and encourages the bargaining efforts of parties to a contract during the crucial period when an existing contract is about to expire and negotiations for a succeeding contract are appropriate.

Section 8 (d) describes the action which employers and labor organizations must take to fulfill the duty to bargain required by the Act. The proviso to the section imposes additional obligations upon the parties where there is in effect a collective bargaining contract, and certain pro-

cedural requirements are outlined in paragraphs (1), (2), (3) and (4).

The language used throughout the proviso limits the application of the procedure set forth therein to termination or modification of a contract at *its expiration date.* Thus paragraph (1) of the proviso clearly says that a party desiring termination or modification of an existing contract shall serve a written notice of the proposed change "sixty days prior to *the expiration date* thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification." [Emphasis supplied.] It does not say that 60 days' notice must be given *whenever* a party wants to negotiate changes in a contract, but that notice must be given only at a particular time—immediately preceding the *expiration date* of the contract, or, if the contract has no expiration date, then 60 days prior to the proposed termination or modification. The latter provision obviously covers contracts of indefinite duration or one terminable at will as in this case.

Paragraph (2) of the proviso requires a party desiring termination or modification of a contract to offer to meet and confer with the other party for the purpose of "negotiating a new contract or a contract containing the proposed modifications." Such language points to the negotiation of a contract to succeed an existing contract upon its expiration date.

Paragraph (4) of the proviso directs that a party desiring to terminate or modify a contract shall continue in effect, without resort to strike or lockout, the terms of the contract "for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later." The notice referred to in this paragraph is the notice which paragraph (1) states shall be given "sixty days prior to the expiration date" of a contract. Hence the 60-day period during which strikes and lockouts are banned by paragraph (4) would ordinarily be the 60-day period immediately preceding the expiration date of a contract. However, in the event the party who is required to give notice delays and fails to give notice at the time specified in paragraph (1), he is prohibited from engaging in a strike or lockout after the expiration date of the contract when he would otherwise be free to exert his economic force; he may not use such tactics until 60 days after he has given the required notice. Thus paragraph (4) regulates the conduct of parties to a contract *during the period around its expiration date.*

That part of Section 8 (d) after the outline of procedure to be followed by a party seeking termination or modification of a contract further demonstrates that the proviso applies only to termination or modification of a contract upon its expiration. Here Section 8(d) explains that the duties imposed by paragraphs (2), (3), and (4) shall become "inapplicable upon an *intervening certification* of the Board, under which the labor

organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of Section 9 (a)." [Emphasis supplied.] Under our well-known contract bar policy the Board refuses to conduct representation proceedings when a bargaining contract is in existence, absent unusual circumstances. Therefore, an "intervening certification" would usually occur only during the period around the expiration date of a contract.

Section 8 (d) further clarifies the proviso by stating that the obligations set forth in paragraphs (2), (3) and (4) shall not be construed as requiring either party to a contract for a fixed period to discuss modification of its terms if such modifications will become effective before the contract provides for the reopening of terms. Therefore the modifications contemplated by paragraphs (2), (3), and (4)—modifications on which the parties have an obligation to discuss—must be modifications which would become effective upon the expiration of the existing contract and which would appropriately be negotiated during the period around the expiration date of the contract.

Finally, Section 8 (d) provides that "any employee who engages in a strike within *the* sixty-day period specified in this subsection shall lose his status as an employee * * * for the purposes of Sections 8, 9, and 10, of this Act." [Emphasis supplied.] This language contemplates only *one* 60-day period, the notice period which paragraph

(1) declares shall begin 60 days before *the expiration date* of an existing contract. It does not contemplate *a* 60-day cooling-off period at *any* time during the term of a contract that one party desires to change the contract. The proviso does not purport to regulate strikes or strikers at any time other than during this specified 60-day period.

Not only does the wording of the proviso to Section 8 (d) show that Congress was prescribing certain standards of conduct during the period around *the expiration of a contract*, but the legislative history concerning the proviso also supports this view.

The provisions of Section 8 (d) were derived from the Senate Bill. The Senate Report on S. 1126 referring to Section 8 (d) states:

> "Another substantive feature of this subsection is a provision which relates to employers and labor organizations which are parties to collective agreements. *Most agreements have an expiration date, with an automatic renewal clause in the absence of advance notice by either side of a desire to terminate or modify. Under this section, parties to collective agreements in the future would be required to give 60 days' notice in advance of the termination date, if they desire to terminate or amend.* Should the parties fail to agree on a new contract in the next 30 days, the party taking the lead in refusing *the old contract* has the duty to notify the new Federal Mediation Service of the im-

passe. Should the notice not be given on time, *irrespective of the presence or absence of a 60-day clause in the collective agreement,* it becomes an unfair labor practice for an employer to change any of the terms or conditions specified in the contract for 60 days or to lock out his employees. Similarly, it is an unfair labor practice by a union to strike before the expiration of the 60-day period. Any employee who engages in a strike during the 60-day period would lose any rights under Sections 8, 9, and 10 of the Wagner Act, unless and until he is reemployed. It should be noted that this section does not render inoperative the obligation to conform to notice provisions for longer periods, if the collective agreement so provides. Failure to give such notice, however, does not become an unfair labor practice if the 60-day provision is complied with." (Emphasis added.) (Sen. Rep. No. 105 on S. 1126, p. 25.)

The legislative history, as reflected in the remarks of Senator Taft on the floor of the Senate, also demonstrates that the purpose of the proviso, in his opinion, was to afford the parties to a contract adequate time "before the end of the contract" for free collective bargaining and the intervention of the Mediation Service. In this connection Senator Taft stated:

"We have provided in the revision of the collective bargaining procedure, in connection with the mediation process, that before *the end*

> *of the contract,* whether it contains such a provision or not, either party who wishes to open the contract may give 60 days' notice in order to afford time for free collective bargaining, and time for the intervention of the Mediation Service. *If such notice is given,* the bill provides for no waiting except during *the life of the contract* itself. *If, however, either party neglects to give such notice and waits, let us says, until 30 days before the end of the contract to give the notice, then there is a waiting period provided during which the strike is an unlawful labor practice for 60 days from that time, or to the end of the contract and 30 days beyond that time.* In that case there is a so-called waiting period during which a strike is illegal, but it is only brought about by the failure of the union itself to give the notice which the bill requires shall be given. So it seems to me to be no real limitation of the rights of labor unions." (Cong. Rec., April 23, 1947, p. 3955). (Emphasis added.)

Likewise, Senator Ives, in proposing an amendment to Section 8 (d) (3), not material to this case, described Section 8 (d) as one, "which provides that employers or employees shall serve notice 60 days *before the expiration of a contract* if there is going to be any change * * *" (Emphasis supplied.) (Con. Rec., May 9, 1947, p. 5081).

The Chairman and Members Rodgers and Beeson argue that it would be futile to require a cool-

ing-off period only at the termination of the contract. But that is just what Congress did, although I cannot agree that Congress by so doing indulged in a futility. Their opinion states that "it is as desirable to discourage interruptions to the free flow of commerce arising from labor disputes during the life of a bargaining agreement as at or near its termination." This conclusion, which appears to be central to their interpretation of Section 8 (d), seems to me to be based essentially upon what they individually believe would be good policy rather than upon the language of the statute or the legislative history. It is my opinion, however, that it is neither incumbent upon the Board nor proper for the Board to question the wisdom of Congress as reflected in the words of Section 8 (d) and its legislative history. In the words of the Supreme Court of the United States in *Colgate-Palmolive Peet* v. *N.L.R.B.*, 338 U.S. 355 at 363, "It is not necessary for us to justfy the policy of Congress. It is enough that we find it in the statute." I am of the opinion that my interpretation of Section 8 (d) is a literal application of the language enacted by Congress toward a logical and reasonable result. By giving literal effect to the words of Congress, I have avoided statutory surgery, on the one hand, or legislative policy engrafting, on the other.

Although the language of the statute speaks for itself, I have also found, as it appears above, that supporters of the bill, including the Chairman of the Senate Committee, believed that Section 8 (d) was applicable *only* at the time around the expira-

tion of the contract. In going to the legislative history, I have looked to the Committee Reports and the statements in debate of supporters of the bill, unlike the Chairman and Members Rodgers and Beeson, who rely upon the statements of Senators Murray and Morse who voted against the bill and upon the Senate Minority Report. As the Supreme Court stated in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 at 394, "The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of statutory words is in doubt."

I cannot, among other things, reconcile the provision of Section 8 (d) that, "the duties so imposed shall not be construed as requiring *either party* to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract" with the conclusion of Member Peterson that Congress established a mandatory 60-day "cooling-off" period which "attaches *whenever* the parties enter into negotiations to modify or terminate a contract." Is it reasonable to conclude that Congress could have required a "cooling-off period" for bargaining at a time when it expressly stated neither party was under an obligation to bargain on changes in the contract?

I wish to make it clear beyond any doubt that in my opinion Congress has not removed no-strike

clauses in contracts from the sphere of collective bargaining and legislated them into every collective bargaining agreement by the terms of Section 8 (d). Congress did, in effect, write into contracts a 60-day notice period similar to the 60-day notice to terminate or modify contracts with automatic renewal clauses, which the Senate Report stated are found in "most agreements." In referring to such contractual provisions, the Senate Report, quoted earlier, stated that "irrespective of the presence or absence of the 60-day clause in the collective agreement" parties to contracts must give such 60-day notice to terminate or modify under Section 8 (d). I am unable to perceive in the language of Section 8 (d) or in the legislative history any indication that Congress intended to remove agreements not to strike from the practices and procedures of collective bargaining and to write a no-strike clause into every collective bargaining contract. I would, moreover, be very hesitant to make such an inference of Congressional intent in the face of the admonition contained in Section 13 of the Act, which states: "Nothing in this Act, *except as specifically provided for herein,* shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." (Emphasis supplied.)

That Congres did not intend to enact compulsory no-strike clauses into contracts is also evident from another section of the Senate Report. In Senate Report No. 105 on S. 1126, on pages 16 and 17, the

Senate Committee discussed Title III of the amendment which relates to suits by and against labor organizations for breach of collective bargaining agreements. The Committee viewed the provisions of Section 301 as insuring the stability to be desired in collective bargaining relations. The Committee, however, made it apparent that it did not intend to write no-strike clauses into collective bargaining agreements by the enactment of Section 8 (d), for on page 17 *immediately following the paragraph quoted in footnote 3 of the three-Member opinion* the Report stated:

> It has been argued that the result of making collective agreements enforceable against unions would be that *they would no longer consent to the inclusion of a no-strike clause in a contract.* This argument is not supported by the record in the few States which enacted their own laws in an effort to secure some measure of union responsibility for breaches of contract. Four States—Minnesota, Colorado, Wisconsin, and California—have thus far enacted such laws and, so far as can be learned, no-strike clauses have been continued about as before.
>
> In any event, *it is certainly a point to be bargained over* and any union with the status of "representative" under the NLRA which has bargained in good faith with an employer should have *no reluctance in including a no-strike clause if it intends to live up to the terms*

> *of the contract.* The improvement that would result in the stability of industrial relations is, of course, obvious. (Emphasis supplied.)

If Congress had intended to prohibit strikes at any time during the term of a contract, would it have been concerned with the argument that Title III, Section 301, (that labor unions may sue and be sued in the Federal courts) would discourage unions from agreeing to the inclusion of no-strike clauses in contracts? If it had been intended to remove no-strike provisions from the realm of collective bargaining, would the Report have then stated that the inclusion of no-strike clauses in contracts "is certainly a point to be bargained over?" Would it have made the declaration of opinion that a union which intends to live up to its contract ought not to be reluctant to agree to a no-strike clause? I think not.

The Chairman and Members Rodgers and Beeson refer to the interpretation given to Section 8 (d) by the Court of Appeals for the Eighth Circuit in *Local No. 3, United Packinghouse Workers of America, CIO* v. *National Labor Relations Board.* In my opinion the Court rejected the construction placed upon Section 8 (d) by the Chairman and Members Rodgers and Beeson; the Court also refused to accept the interpretation of Member Peterson. Both viewpoints were presented to the Court. Under these circumstances and with due respect to the Court of Appeals for the Eighth Circuit, I am constrained to adhere to the views ex-

pressed in my opinion until the Supreme Court of the United States has had an opportunity to pass on the question.

The Chairman and Members Rodgers and Beeson state that their interpretation does not have the effect of writing a no-strike clause into every contract—only into some agreements. It is apparent that this statement significantly limits the broad, general, and sweeping language and rationale which appear before that statement in their opinion. As I have explained earlier, however, the language of Section 8 (d) contemplates *one 60-day period* within which employees who engage in a strike shall lose their status as employees.

The three-member opinion further states that their interpretation of Section 8 (d) "preserves the right to strike in all circumstances where the parties have provided in their agreement for negotiating substantial changes in its provisions . . ." This in its context is tantamount to saying that Section 8 (d) wrote a no-strike clause in every collective bargaining contract for the period of its duration but that the parties by agreement to a reopening clause can nullify or abrogate the statutory provision as the three Members construe it. This in itself as a principle is very questionable, but more than that, I find it extremely difficult to reconcile this position with that taken by the same Board Members in *General Electric Company,* 108 NLRB No. 183, where the majority set aside a contract as a bar to a representation petition because of the nature of its reopening provisions. As

I view it, the three Members are stating in the present case that they are protecting the right to strike during the term of a contract if the parties have provided for reopening to negotiate substantial changes. With equal force, however, in the *General Electric* case the majority has declared that if the parties do exercise the right to agree on such provisions, under the circumstances of that case, stability does not exist and the union is immediately vulnerable to a rival petition. Not contributing to an understanding of what the majority is preserving is the majority opinion in *American Lawn Mower Co.*, 108 NLRB No. 215, (cited by the three Members in footnote 9) in which the modification and termination clauses of a contract were coterminus and where the majority, holding that a notice to modify actually terminated the contract, stated, "It would seem incongruous to hold that there is a valid contract binding upon the parties at the very time that the Union strikes to obtain an effective agreement with the Employer." I fail to discern the filament of logic or consistency which would make these various statements and decisions coherent.

As I analyze their opinion, the Chairman and Members Rodgers and Beeson further limit the general basis of their argument by stating that the opinion expressed by them "has no bearing on the right to strike for reasons and purposes other than to obtain contract modification or termination." By this, I take it, they agree with the decision in *Mastro Plastics Corp.*, 103 NLRB 511, where

former Chairman Herzog and I dissented in part. As we stated: "The language used in Section 8 (d) does not distinguish as to what types of strikes or lockouts are prohibited during the 60-day period." Our reasons for disagreeing with the majority on this point are fully expressed in our opinion in that case and will not be repeated here.

In summary, as to the interpretation of Section 8 (d), I am convinced by the language of that section that the proviso applies only when parties to a fixed-term contract seek to terminate or modify it upon its expiration or when they seek to terminate or modify a contract of indefinite duration or one terminable at will. I further think that this view is a reasonable one, consistent with the intent of Congress as revealed in the legislative history.

Having reached this conclusion as to the meaning of Section 8 (d) there remains the effective application of this section to the facts in the present case. As I interpret the duration provisions of the contract between the Respondent and the Union, the contract was to be in effect until October 23, 1951, and thereafter was to continue as a contract terminable at will upon the giving of notice in accordance with specified procedure. After October 23, 1951, therefore, the contract was in existence without a definite termination date, but could be brought to expiration simply and reasonably by compliance with its clear terms at the will of either party. Under my view of the Statute, Section 8 (d) was applicable whenever one of the parties desired to terminate this *latter* contract. The Union was

therefore obligated at such time to comply with the procedures set forth in that section. Such procedures required the Union here, where the contract contained no expiration date, to serve written notice upon the Respondent of its proposed termination or modification of that contract 60 days prior to the time it proposed to make such termination or modification and to refrain from striking during those 60 days. This the Union failed to do when it went on strike in April 1952 to compel immediate modification or termination of the existing contract by agreement on the Union's proposals. The earlier notice it gave on August 24, 1951, did not meet the 8 (d) requirements. That notice was of a desire to amend the initial contract for the purpose of complying with the provisions of the contract on amendments; it was given before the contract terminable at will came into being and hence was given before the period when the proviso to Section 8 (d) applied. As the Union failed to give notice to the Respondent and the Conciliation Service and any state mediation agency as required by Section 8 (d), and the employees, nevertheless, struck, the strikers lost their status as employees of the Respondent and were not entitled to reinstatement at any time after they struck on April 30, 1952.

The Chairman and Members Rodgers and Beeson have decided that the "expiration date" or "modification date" of the contract was October 23, 1951, and conclude that the notices given on August 24, 1951, met the requirements of Section 8 (d). Ac-

cording to them, "If Section 8 (d) is considered in the framework of industrial reality and in the perspective of the Congressional purpose to protect the stability of collective bargaining agreements against strikes and lockouts during the life of a contract, it becomes clear that Congress used the term 'expiration date' to signify the date in the course of a labor contract when the contract by its own terms is subject to either modification or termination . . . " That Congress was aware of, and took into consideration, the fact that many contracts contain a 60-day automatic renewal provision effective 60 days *before the termination date* of a contract is apparent from the reference made to those provisions on page 25 of the Senate Report which is quoted and discussed earlier in this opinion. I do not know, however, what "framework of industrial reality" dictates that the Chairman and Members Rodgers and Beeson then find that "expiration date" means something esoteric, or something quite unlike the meaning ordinarily applied in the law of contracts. I suggest that the problem of expiration date, which to me means "termination date," created by the Chairman and Members Rodgers and Beeson would quickly dissolve if they were willing to read, and to give effect to, the simple and cogent language of the contract itself. Under those provisions the notice given on August 24, 1951, did not *terminate* the contract, and, when October 23, 1951, arrived, the contract did not expire, but under its terms was converted into a contract terminable at will upon the

giving of the 60-day notice to terminate required by its terms. It is my opinion that, except when it would be contrary to law, the terms of a contract freely arrived at after collective bargaining should be given the clear meaning intended by the contracting parties.

In view of the Union's failure to comply with Section 8 (d) of the Act and the Respondent's genuine attempts to reach a collective bargaining agreement from August 29, 1951, to August 3, 1952, when a new contract was executed, I would not find violations of Section 8 (a) (5) in the isolated incidents alleged as such violations.

As I would find neither a violation of Section (a) (3) nor Section 8 (a) (5), I would dismiss the complaint in this case.

Dated, Washington, D. C.

ABE MURDOCK, *Member,*
NATIONAL LABOR RELATIONS BOARD

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

## No. 124

LOCAL NO. 3, UNITED PACKINGHOUSE WORKERS OF AMERICA, CIO,

*Petitioner,*

*vs.*

WILSON & CO., INC., A CORPORATION, AND NATIONAL LABOR RELATIONS BOARD,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## SUPPLEMENTAL BRIEF OF RESPONDENT, WILSON & CO., INC., IN OPPOSITION TO THE PETITION.

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## SUPPLEMENTAL BRIEF OF RESPONDENT, WILSON & CO., INC., IN OPPOSITION TO THE PETITION.

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### INTRODUCTION.

This supplemental brief is filed in order to invite the attention of the Court to a decision of the National Labor Relations Board rendered subsequent to the filing of this respondent's brief in opposition to the petition for a writ of certiorari.

### ARGUMENT.

Petitioner vigorously contends that in its interpretation of Section 8(d) of the Labor Management Relations Act (61 Stat. 142, 29 U. S. C., Supp. V, 158(d), set forth in the Appendix hereto), the decision of the Court below is probably incorrect (Pet. 11), and that the said decision "over-

turns the Board's settled construction of the statute" (Pet. 12).

The National Labor Relations Board on August 8, 1954, filed its decision in *Lion Oil Company and Oil Workers International Union, CIO,* case No. 15-CA-488, reported in 109 NLRB No. 106. This decision involved a comprehensive review and interpretation of the notice provisions of Section 8(d) of said Act.

In the course of its opinion, the Board considered the decision of the Court below and commented as follows:

> "Our decision in this case is not inconsistent, we believe, with the interpretation which the Court of Appeals for the Eighth Circuit placed upon Section 8(d) in its opinion in the *Wilson* case. *Local No. 3, United Packinghouse Workers of America, CIO* v. *National Labor Relations Board,* 210 F. 2d 325, 331-333. In that case a strike was called more than 60 days after the giving of notices of the kind required by Section 8(d), but before the expiration date of a contract between the Company and the Union. A majority of the Board in the *Wilson* case had concluded that Section 8(d) prohibits a strike to secure modification or termination of a contract only for a period limited to 60 days after the notices required by the Section have been given, and had held that the strike in question did not contravene the Section because the 60-day waiting period had been satisfied. The Court of Appeals believed, however, that the strike contravened Section 8(d) because it occurred before the expiration date of the bargaining contract. Because of the basis on which the Board decided the *Wilson* case, the construction of 8(d) which we adopt here was not presented by the Board to the Court. Leaving aside the effect of the wage reopener, we agree with the view of the Court of Appeals, consistent with the opinions expressed herein, that the 60-day notice period is not the maximum waiting period. Subject to the construction which we have given to Section 8(d) here, we adopt the view that the waiting period extends until the 'expiration date' of the contract."

Thus the Board itself has ruled, contrary to the contention of petitioner, that the interpretation which the Court of Appeals for the Eighth Circuit placed upon Section 8(d) of the Act in the opinion below is not inconsistent with the Board's present construction of the statute.

## CONCLUSION.

It is respectfully submitted that the foregoing constitutes an additional reason for the denial of the petition for a writ of certiorari in this case.

Respectfully submitted,

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## APPENDIX.

Section 8(d) of the Labor Management Relations Act (61 Stat. 142, 29 U.S.C., Supp. V, 158(d)) is as follows:

"Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the

dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9 and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

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IN THE

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT**

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**SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER**

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Since the filing of our Petition for Certiorari in this case and of the responses thereto, the National Labor Relations Board has handed down a decision in *Lion Oil Company,* 109 NLRB No. 106 (decided August 8, 1954), reiterating its holding in the present case that Section 8(d) of the Act does not prohibit a strike during the life of a collective bargaining agreement when the agreement provides for reopening and does not contain a no-strike clause.

This Memorandum is filed because the Board's new decision rests on a somewhat different construction of the statute than that followed by the Board in the present case.

**The Lion Oil Decision**

The present (*Wilson*) case and the *Lion Oil* case both present the question whether Section 8(d) of the Act prohibits a strike during the life of a collective bargaining agreement when the agreement provides for reopening, and does not contain a no-strike clause, and when the 60-days' notice is given. In both cases the Board upheld the right to strike; but the ground of decision now advanced by the Board majority in the *Lion Oil* case differs from the prior Board doctrine under which the present case was decided.

The prior doctrine was laid down in *United Packinghouse Workers of America, CIO, and Wilson & Co.*, 89 NLRB 310 (1950), an earlier dispute between the parties to the present case. In that case the Board held that Section 8(d) does not forbid a strike during the life of a contract, whether or not the contract has a provision for reopening, so long as the 60-day notice is given and the contract does not contain a no-strike clause. The Board reached this conclusion by holding that the crucial phrase "whichever occurs later" in Section 8(d)(4) is intended to only apply when notice is given *less* than 60 days before the contract's expiration date.

In the present (*Wilson*) case, the Board, after stating that the contract provided for reopening and did not contain a no-strike clause (R. 86), simply cited the *United Packinghouse Workers* case as disposing of the contention that the strike violated Section 8(d) (R. 87).

Factually, the *Lion Oil* case precisely parallels the present (*Wilson*) case: the contract provided for reopening and did not contain a no-strike clause, and the 60-days' notice was given. On these facts the Board held, as in the present case, that the strike was not illegal under Section 8(d).

In the *Lion Oil* case, however, the Board majority reached this conclusion by holding that the term "expiration date" in Section 8(d)(4) encompasses both the termination and the modification date of a contract. This is the Board's language:

> "If Section 8(d) is considered both in the framework of industrial reality and in the perspective of the Congressional purpose to protect the stability of collective bargaining agreements against strikes and lockouts during the life of the contract, it becomes clear that Congress used the term 'expiration date' to signify the date in the course of a labor contract when the contract, by its own terms, is subject to either modification or termination, regardless of whether notice is required explicitly by the agreement. The term 'expiration date' as used in Section 8(d)(4) thus has a twofold meaning; it connotes not only the terminal date of a bargaining contract, but also an agreed date in the course of its existence when the parties can effect changes in its provisions."

This holding disposed of the issue before the Board:

> "It suffices for our decision here that the contract specifically provided for modification and that the earliest date on which modification could be made effective was October 23, 1951. The notice was given precisely 60 days before that date. As the notice was served on August 24, the end of the 60 days statutory period and the date fixed in the contract for making modifications (which, as indicated above, we consider tantamount to 'expiration' as that term is used in Section 8(d)(4)) coincided. Thus, the Union, before striking to enforce its economic demands satisfied the statutory requirements, and consequently the striking employees never lost the protection accorded economic strikers by the Act."

The majority of the Board went on to declare, however, that in its view a strike is not permissible under a contract which does not contain a reopening clause, even though the contract does not contain a no-strike provision. This

dictum that Section 8(d) prohibits a strike during the life of a contract not providing for reopening, even though the 60-days' notice is given and even though the contract does not contain a no-strike clause is, of course, contrary to the construction given the statute by the Board to the *United Packinghouse Workers* case. In the words of Member Peterson, who concurred in the result, the new dictum writes a no-strike clause into every contract unless the contract contains a provision for reopening.

The Board majority in *Lion Oil* went on to express the belief that its new interpretation of Section 8(d) is not inconsistent with the decision of the court below in the present case. It said:

> "Our decision in this case is not inconsistent, we believe, with the interpretation which the Court of Appeals for the Eighth Circuit placed upon Section 8(d) in its opinion in the *Wilson* case. *Local No. 3, United Packinghouse Workers of America, CIO,* v. *National Labor Relations Board,* 210 F. 2d 325, 331-333. In that case, a strike was called more than 60 days after the giving of notices of the kind required by Section 8(d), but before the expiration date of a contract between the Company and the Union. A majority of the Board in the *Wilson* case had concluded that Section 8(d) prohibits a strike to secure modification or termination of a contract only for a period limited to 60 days after the notices required by the Section have been given, and had held that the strike in question did not contravene the Section because the 60-day waiting period had been satisfied. The Court of Appeals believed, however, that the strike contravened Section 8(d) because it occurred before the expiration date of the bargaining contract. Because of the basis on which the Board decided the *Wilson* case, the construction of 8(d) which we adopt here was not presented by the Board to the Court. Leaving aside the effect of the wage reopener, we agree with the view of the Court of Appeals, consistent with the opinions expressed herein, that the 60-day notice period is not the maximum waiting period. Subject

to the construction which we have given to Section 8(d) here, we adopt the view that the waiting period extends until the 'expiration date' of the contract."

**Effect of Lion Oil on the Petition in this Case**

We submit that the *Lion Oil* decision does not obviate the need for this Court to review the present case, but rather accentuates it. We urge: (1) *Lion Oil* cannot be reconciled with the decision below. It does not settle the question of statutory construction, but rather further confuses it. (2) As urged in the Petition and conceded in the Government's Memorandum, the question of the proper interpretation of Section 8(d) is important, and its immediate resolution by this Court desirable.

1. The statement of the Board that its decision in *Lion Oil* "is not inconsistent" with the decision below in the present case has scant foundation. On identical facts the court below held the strike illegal in the present case, and the Board held it legal in *Lion Oil*.

The Board's *Lion Oil* opinion seeks to reconcile the two decisions by stating that "the construction of 8(d) which we adopt here was not presented by the Board to the Court" in the *Wilson* (the present) case, and that "Leaving aside the effect of the wage reopener, we agree with the Court of Appeals * * *" that the strike was illegal in *Wilson*.

The Board's statement that its *Lion Oil* construction of 8(d) was not presented "by the Board" to the Court in the present (*Wilson*) case is literally correct. Board Counsel did not argue in the court below that a modification date is equivalent to "expiration date." Rather Board Counsel argued the case on the ground that 8(d) "was designed to cover the situation where the notice was given less than 60 days before the expiration date" (Board Brief, p. 66).

However, the theory now advanced by the Board in *Lion Oil* was explicitly argued in the court below in the present case by counsel for the Petitioner, the Intervenor

below. Indeed Petitioner argued the case solely on the ground that Section 8(d) permits a strike under a contract reopening. Thus, the Petitioner's Brief below on this point commences (p. 6):

"ARGUMENT

I.

"SECTION 8(d) OF THE ACT HAS NOT OUTLAWED STRIKES OVER ISSUES ON WHICH A CONTRACT HAS BEEN VALIDLY REOPENED.

> "There is apparently no dispute in the present proceedings as to the fact that in reopening its contract with the Company in December 1947 the Union fully complied with the requirements of the contract (App. 1047). It is further undisputed that the contract permitted strikes and lockouts in connection with such a reopening (App. 990-991). Finally it is undisputed that all notices required under Section 8(d) of the Act, to the Company (App. 1055-1056) and to the appropriate Federal and state agencies (App. 1009-1013), were given. There was no strike until some twelve weeks after the notice to the Company."

Further, Petitioner explicitly urged that modification under a wage reopener is equivalent to an "expiration date" under Section 8(d). Its brief below argued (p. 10):

> "4. Moreover, the chaotic consequences of the Company's interpretation are not even fully indicated by the nature of the problem posed by the facts of this specific case. It is not uncommon in collective bargaining relations to have not merely certain limited items such as wages on which the parties agree to reopening in advance of the expiration date of the general collective bargaining agreement but also to have certain other limited matters (such as pensions) on which the parties agree to further even greater continuity by covering such matters for a substantially extended period going beyond the 'expiration date' of the general agreement covering conditions of employment. In such a circumstance, which 'expiration

> date' would the Company regard as constituting the effective date of a right to strike under Section 8(d)? In the present case the Company has insisted that the 'expiration date' does not refer to the effective date of the reopening with respect to specific issues (despite the fact that as to such issues the contract by virtue of the notice has been 'terminated') but refers to the expiration date of the entire contract. In a situation where there is an agreement on a long term covering a pension plan, would the Company insist that the right to strike arises only at the 'expiration date' of all agreements? If not, how would the Union ever be able to determine which 'expiration date' the Company would claim to be the governing one? Would the Union then for its own protection be compelled to insist that on all matters, wages, general working conditions, pensions, etc., the entire agreement must expire at one time and after a relatively brief interval, despite full recognition that as a practical matter the varying requirements of varying issues should dictate varying terms and varying periods of reopening and renegotiation?"

This argument, as well as that of Board Counsel, was rejected by the court below, which held that Section 8(d) must be literally construed as forbidding any strike during the life of a contract. The Board's *Lion Oil* holding that a strike pursuant to a contract reopening provision is not forbidden by 8(d) thus conflicts squarely with the decision below in the present case.

It is, of course, true that the Board's *Lion Oil* dictum that 8(d) forbids a strike if the contract does not provide for reopening is consistent with the view of the court below that 8(d) forbids any strike during the life of a contract regardless of whether it provides for reopening. But that is not the question which this case presents, nor, as shown below, is it the significant question of statutory construction which 8(d) presents. The more important issue, and the issue this case presents, is whether strikes pursuant to reopening clauses are legal.

2. That brings us to our second point, that the question of the proper interpretation of Section 8(d) here presented continues to be important and that its prompt resolution by this Court continues to be desirable.

As urged in our Petition, and as acknowledged by the Government in its Memorandum (p. 4), the question whether Section 8(d) prohibits any strike during the life of a collective bargaining agreement, is an issue of "such a nature and importance as to warrant review by this Court."

The *Lion Oil* decision has, we submit, not resolved this issue, but rather added to the confusion. Normally this Court might prefer to await clarification through further litigation in the courts of appeals. But the speedy resolution of the issue by this Court is urgently needed: it affects the right to strike under outstanding collective bargaining agreements covering millions of workers, and the terms of all collective bargaining agreements hereafter to be negotiated.

In the Petition, we assumed that the decision in this case would affect the right to strike under every collective bargaining agreement which either (1) contains a reopening clause or (2) does not contain a no-strike clause. After summarizing the available data on outstanding collective bargaining agreements, the Petition states (p. 10):

> "It therefore appears that some 50 to 55 percent of the collective bargaining contracts permit strikes in some circumstances, such as a deadlock in negotiations on a wage reopening, and that another 10 or 12 percent do not restrict the right to strike during the life of the contract."

If, however, we accept for present purposes the distinction the Board has drawn in *Lion Oil* between contracts providing for reopening and those simply not containing a no-strike clause, it is only those in the former category which are affected by the present decision. The present

case, in other words, affects the right to strike under some 50 to 55 percent of the outstanding collective bargaining contracts, and not 60 to 67 percent as suggested in the Petition.

We respectfully submit, however, that an issue affecting the right to strike under half of the collective bargaining agreements outstanding in this country is sufficiently important to warrant its resolution by this Court. As the Board states in its opinion in the *Lion Oil* case provisions for reopening are "now almost universal in bargaining contracts exceeding one year in duration." The right to strike under all these contracts is placed in doubt by the decision below.

Further, as stated in our Petition (pp. 10-11):

> "* * * new contracts are being negotiated daily, and unions cannot safely ignore the decision below. While it stands, unions will be under strong impulsion to negotiate short term contracts, instead of longer term contracts with a wage reopening and the right to strike. Such a development would * * * make for less stable labor relations."

The millions of workers affected by this issue need to know in advance whether they may or may not legally strike. They need to know that when they make their decision whether to strike, not years afterward. New contracts are being negotiated every day. Unions need to know when they negotiate them whether they may safely sign long term contracts with reopening clauses, or must insist on short term contracts. They cannot know that now.

In the Petition, we also urged that the decision below is probably incorrect because it overturns the Board's settled construction of the statute, which Congress has acquiesced in. This, we believe, continues to be so. The decision below rejects the Board's view, reaffirmed to in the *Lion Oil* case, that Section 8(d) does not forbid strikes under reopening clauses. While the decision below

in the *Wilson* case is consistent with the dictum in *Lion Oil,* that a strike is not permissible in the absence of a reopening clause, that is, as the statistics quoted above show, only the smallest part of the problem. Further, the Congressional acquiescence in the Board's construction, dealt with in our Petition (pp. 13-17) relates only to the right to strike under a reopening clause.

## CONCLUSION

For the reasons stated in the Petition and in this Supplemental Memorandum it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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